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In the Supreme Court of the United States

October Term, 1962

No. [redacted] 187

FRED ISAACS AND HARRY ISAACS

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1. The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.[1]

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[1] The Joint Appendix is hereinafter cited as "App. p. ". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript

JURISDICTION

The judgments of the Court of Appeals were entered on March 22, 1962 (App, pp. 111-12). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). Time for filing of petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether knowledge of a single conspiracy with multiple objectives and a purpose to further it may be permitted as a matter of law to be found as against petitioners, solely from their participation in one of the conspiracy's major objectives, where the success of that objective was not dependent on the success of any other objective of the conspiracy.

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was found by the court below not to be supported by any evidence.

STATEMENT

In 1950, and for many years prior thereto, the Twin City Rapid Transit Company and its subsidiaries (herein called the "Transit Company") operated a street railway

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of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. , p. ", together with several unnumbered, typewritten volumes of the pretrial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz. "Exh. BZ", those of defendants by the name of defendant and arabic number, viz. "H. Isaacs, Exh. 1", in accordance with the designation at the trial.

system in Minneapolis and St. Paul, Minnesota, and adjacent suburbs (V. 4, p. 103; V. 5, pp. 125-8).

In March, 1951, one Fred A. Ossanna was elected Chairman of the Board of the Transit Company, and in the fall of 1951, its President (V. 28, pp. 70, 75). Under the Ossanna administration the Transit Company converted to bus operation and in March, 1952, employed one Benson M. Larrick to conduct the conversion (V. 6, p. 123).

One Indictment (4-59-Cr. 77) in a series of Counts charged that Ossanna, Larrick and James A. Towey (an officer of the Transit Company not tried because of illness) and Isadore Blumenfield (a stockholder in the Transit Company, later acquitted by the jury) had conspired with petitioner Harry Isaacs and others in a single over all scheme to defraud the Transit Company in the disposition of street railway property which became surplus in the conversion to bus operation and in that connection had made use of the mails and interstate wire communications (V. 69, pp. 5-18).

The Indictment charged that, as "parts" of the single scheme, certain scrap was transferred to petitioner's Company, American Iron and Steel Corporation ("American Iron"), certain real estate and equipment were transferred to petitioner Harry H. Isaacs (which the trial court ruled was not fraudulent, V. 69, p. 95) and various other assets and commissions were transferred or paid to other parties (V. 69, pp. 8-15). A subsequent Count of this Indictment (Count XVII) charged that all the defendants, including Earl Jeffords, a real estate broker, and other co-conspirators not named as defendants, had combined in the same scheme to defraud and to transfer the same assets as "parts" of the scheme (V. 69, p. 20).

The second Indictment (4-60-Cr. 13), consolidated with

the first Indictment, charged petitioner Fred Isaacs and Theodore Landy (later acquitted by direction of the Court) with having become a party to the same single conspiracy charged in Count XVII of the first Indictment (V. 69, p. 5).

Certain intermediate Counts in the first Indictment charged Ossanna, Larrick, Towey, and petitioner Harry H. Isaacs with engaging in a scheme to accomplish the interstate shipments of certain scrap acquired by fraud by American Iron from the Transit Company (V. 69, pp. 18-20), which scrap the Government through its answer to a Motion for a Bill of Particulars claimed was the same scrap allegedly acquired in fulfillment of the same scheme to defraud (V. 43, p. 110).

At the trial, there was evidence of fraud in the transfer of scrap by the Transit Company to American Iron, and in the sale of real estate and payment of commissions to others, though none in the sale of real estate and equipment to petitioner Harry H. Isaacs. It also appeared that the scrap transactions were the largest in suit and overlapped the others in time. But there was no evidence that the scrap transactions depended on the conceiving or consummation of the other objectives for their success, or were connected in any way with the others, though all the transactions related to the disposition of surplus property and an officer or officers of the Transit Company necessarily participated in all.

The evidence, summarized in terms most favorable to the Government's contentions, can be stated as follows:

The Scrap Transactions: The Transit Company employed American Iron to remove track, trolley wire and other overhead appurtenances in exchange for the salvage removed, first under an exchange of letters between Os-

sanna and petitioner Harry H. Isaacs in July and August, 1951 (Ossanna Exhs. 2, 4, 5, V. 7, pp. 29, 31-4), and then under a formal written contract of February 11, 1952 (Exh. BZ, App. p. 101) and two Addenda thereto (App. pp. 106, 109). The letter agreement required American Iron to "repave wherever necessary" and the formal contract obligated it to "resurface * * * as required by all City Ordinances" of Minneapolis, as the Transit Company was obligated to do under its franchise (V. 6, p. 97; V. 21, pp. 43-4). In practice, American Iron was not required to repave at any time after the formal contract was executed; it had been required to do so on one street in 1951 (V. 20, p. 36; V. 50, pp. 115-16), but there was evidence that the Transit Company had borne the cost of that repaving (Exhs. I-M, I-N, V. 9, pp. 38-9). On October 30, 1953, the City of Minneapolis adopted an ordinance, accepted by the Transit Company on November 27, 1953, under which the Transit Company (and hence American Iron) was relieved of its franchise obligations to perform such removals and repaving, in consideration of $922,700.00 in cash payable over a ten-year period and the removal of so-called "special work" in paved intersections up to a cost of $300,000.00 (App. p. 87). American Iron did not contribute to the Transit Company's cost in cash or services and, so far as appears, was not asked to do so.

The potential cost of removing the rails and repaving in paved streets in Minneapolis substantially exceeded the salvage value of the track and overhead, possibly by as much as $1,000,000.00 (V. 7, p. 136; V. 21, pp. 100, 112; V. 26, p. 43; H. Isaacs Exh. 113, rec'd. V. 59, p. 25). The second addendum to the removal contract, however, dated January 2, 1953, extended to American Iron in terms the right of "removal of underground cables" (App. p. 110),

a provision which could reasonably be construed as extending to all such cables in the Transit Company system (V. 69, pp. 87-8), then of an estimated value of $1,000,000.00, less an estimated cost of removal of $50,000.00 (Exh. AG-2, V. 6, pp. 39-40). In practice, the cables were removed by the Transit Company's own forces and delivered to American Iron (V. 14, pp. 44-5; V. 15, p. 1). Petitioner Fred Isaacs reported to the Transit Company only some 20% of the weight actually received (Exh. JT, rec'd. V. 23, p. 121; Exh. K-1, rec'd. V. 22, p. 122; Exh. JX-4, rec'd. V. 24, p. 118), and American Iron paid for the weight so reported at prices substantially below the market value (V. 25, pp. 105-10), but in a total amount exceeding the estimated cost of removal of all the cable (H. Isaacs Exh. 114, V. 56, pp. 153-7, 179-80). If the second addendum were construed as giving American Iron the right to retain the cables for the service of removing them, as American Iron construed it (App. p. 16), but the Transit Company pulled them for its own purposes, instead of permitting American Iron to do so, American Iron was required to reimburse the Transit Company for the cost of removal, as the trial court agreed (V. 60, p. 106).

The removal contract of February 11, 1952 gave American Iron first option to purchase other, miscellaneous scrap at "ceiling price"; such prices were in effect from January, 1951 through February, 1953 under federal regulations (App. p. 105; V. 46, p. 56). In prior practice, the Transit Company had cleaned, sorted and prepared such scrap to the various specifications of steel mills and refineries, recorded it in inventory, and sold it on competitive bids at the Transit Company's own weights (V. 8, pp. 18-19, 141-2). The Transit Company delivered such scrap to

American Iron without preparation, inventorying, or competitive bidding, and at American Iron's own weights and prices (V. 8, pp. 79, 89-91; V. 26, p. 77). Much of such scrap contained debris and some was worthless (V. 16, pp. 78, 105; V. 18, pp. 125-137). Petitioner Fred Isaacs furnished the Transit Company weight slips reporting 5% to 75% less than the gross weights of the scrap received (H. Isaacs Exhs. 111, 112, rec'd V. 56, pp. 20, 26; V. 16, pp. 25-30). These were forwarded to Larrick, in charge of the Transit Company's scrap program (V. 4, pp. 137-9), and he, in turn, sent American Iron the monthly totals for pricing and remittance (V. 22, pp. 132-140).

The Midcontinent Transaction: On December 22, 1953, the Transit Company contracted to sell petitioner Harry Isaacs, doing business as Midcontinent Construction and Development Company, certain real estate and machinery and equipment for $300,000.00, $100,000.00 in cash and $200,000.00 payable in one year (V. 31, pp. 46-50). All but one of the properties were certified by a qualified engineering firm approved by the Trustees for the company's bondholders, as having a value not in excess of the sale price (V. 32, pp. 105-18). On December 22, 1953, Harry Isaacs entered into a partnership agreement with one Robert Levitt, giving Levitt 52½% of the profits from development and sale of the properties so acquired, in exchange for his guaranteeing payment of the $200,000.00 (Exh. LZ, V. 31, pp. 57, 64-5). Levitt, in turn, took as subpartners his clients, the defendant Blumenfield and four business associates (V. 31, pp. 67-8), though this was not then known to Isaacs or Ossanna (V. 69, pp. 94-5).

The trial court ruled that the Midcontinent transaction was not fraudulent as a matter of law, and dismissed two

related mail fraud counts, but permitted it to be considered on the relationship of the parties (V. 61, p. 72; V. 69, p. 95).

Other transactions: There was evidence of fraud in other transactions tried in the same proceeding. Neither petitioner participated in any of them, or even knew any other defendant or alleged co-conspirator, except the Transit Company officers with whom they dealt in the scrap transactions.

(a) *Mexican Notes:* In 1955, the Transit Company discounted eight notes (V. 27, pp. 119, 170-1), acquired in part payment for streetcars sold in September, 1953 to a transit agency in Mexico City and guaranteed by Nacional Financiera, S.A., an agency of the Mexican Government (Exh. CP-2, V. 28, pp. 29, 33-5). From a total of $728,256.00 received, the Transit Company paid commissions of $238,349.73 to one George A. Francis, who was ostensibly engaged in the export-import business in Mexico City and named as a co-conspirator but not as a defendant (V. 30, pp. 109-10; Exh. BE-26, rec'd. V. 30, p. 88). Francis did not buy the notes (V. 27, pp. 119, 170-1; V. 29, pp. 39-40), and there was evidence that the then going rate of commission for brokerage services was ¼% to 1% of the face amount of the notes, or less than $10,000.00 (V. 30, p. 29). One payment to Francis was deposited in a Miami, Florida, bank, from which Francis withdrew $53,000.00 in cash (Exh. LP; V. 30, pp. 39, 45).

(b) *Hopkins right-of-way:* On May 6, 1955, on recommendation of Ossanna, the right-of-way formerly used for service to the Village of Hopkins, valued between $84,500 and $150,000 (V. 34, pp. 40-1, 133-40), and for two years unsuccessfully offered for highway purposes (V. 35, pp. 3-24), was sold for $10,000.00 to one W. N.

Carlson, named as co-conspirator but not as a defendant (Exh. DD, V. 55, p. 107). Carlson shortly thereafter entered into an agreement with Ossanna's son and daughter to share, as he claimed, the profits and losses fifty-fifty (V. 55, pp. 87-9). Carlson sold the real estate for $125,050 over a three year period (V. 36, pp. 64-66) and paid $52,000 to Ossanna's son and daughter (V. 36, pp. 54-7; Exh. ND-1 rec'd. V. 36, p. 31). They in turn paid $30,000.00 to Ossanna personally and to an Ossanna family corporation, to repay an indebtedness to them, Ossanna claimed (V. 51, pp. 147-8, 158-9, 165).[2]

(c) *Jeffords Commission:* During the period July 6, 1954 through February 16, 1955, the Transit Company paid defendant Jeffords, doing business as J & C Holding Company, a total of $107,500.00 as purported commissions on the sale of three properties (V. 36, pp. 85-6; V. 37, p. 55; V. 38, pp. 114-15). There was evidence that Jeffords did not procure the purchases and had no valid listings (V. 36, pp. 72-83; V. 37, pp. 24-8, 136, 181-4; V. 38, pp. 107-15, 176). Jeffords withdrew substantial sums in cash as received (V. 39, pp. 83-6, 100, 102) and claimed that he lost $65,000.00 gambling in Florida (V. 38, pp. 53, 54).

(d) *The Towey Lots:* On March 1, 1954 Towey purchased two lots from the Transit Company in his uncle's name for $500.00 and resold them for $5,500.00

[2] On May 23, 1955 Jeffords and his partner, one Marvin Benjamin, acquired an option from Carlson to purchase 800 feet which were in fact located on the Hopkins right-of-way, which agreement was on November 25, 1955 modified so as to release to Carlson 650 feet in consideration of $8000.00 (Exh. NC-1, V. 35, pp. 55-7; Exh. NE-1, V. 35, pp. 57, 61). In July, 1955, Jeffords and his partner sold 150 feet for $12,000 (V. 35, pp. 64-5), with the result that, on all the transactions, they made a net profit of $14,000.00.

while masquerading as his uncle (V. 33, pp. 91-3, 172-3, 178-9).[3]

Such, basically, was the evidence, viewed most favorably to the Government. Although no question is presented as to the sufficiency of the evidence of fraud in the scrap transactions, or any transaction in suit, separately considered, a further statement is required for a consideration of the second of the two questions presented on this petition, involving the Minneapolis Conversion Ordinance.

The Minneapolis Conversion Ordinance: The trial court permitted the jury to find fraud in the procurement and enactment of the Minneapolis Conversion Ordinance, of which the court below specifically found there was no evidence. That court however affirmed the convictions of petitioners on another theory, for which there was evidence.

The removal contracts, as the trial court instructed, required American Iron to perform or to be ready, willing and able to perform, all of its contract obligations, including the most onerous one, that of repaving in Minneapolis, as a condition of obtaining track and overhead or underground cable in exchange for the service of removal (V. 69, pp. 87-8). The Indictment charged that American Iron was fraudulently relieved of its contract repaving obligations as a "part" of the scheme to defraud (V. 69, p. 11), and this became a major issue at the trial (see, e.g. V. 20, pp. 16-120; V. 21, pp. 8-114, 180-99; V. 49, pp. 190-200; V. 50, pp. 3-123; V. 69, pp. 39-40, 88-9).

[3] On January 17, 1955, the Transit Company paid one Paul Villaume a reasonable $37,500.00 commission for services in procuring the sale of certain real estate (V. 37, pp. 190-1). Villaume thereupon made a donation of $7500.00 to the Ossanna Foundation (V. 37, p. 193). The Government's theory, as stated by the Court below was that as a part of the scheme to defraud the Transit Company paid in the form of a commission $7500.00 more than it was obligated to pay Villaume (App. p. 31).

In particulars given in advance of trial, the Government claimed that the fraud occurred at the time, and because, of the enactment of the Minneapolis Conversion Ordinance of October 30, 1953 and its acceptance by the Transit Company, which action relieved American Iron, without any consideration, of its obligations to repave. This claim was stated by the Government as follows:

> "Mr. Janes: * * * the Transit Companies had, of course, the obligation to resurface. It was the Transit Companies' obligation to the City. After there had been some removal of rail and some lesser repaving, the Transit Companies acquired a release from the City of its entire obligation for a substantial consideration, and in so doing, at the Transit Companies' expense, achieved the release of American Iron and Supply Company's obligation to do some repaving, and released the Transit Companies' obligation in the future, and anybody else's that might arise, by contract or otherwise, throughout the City.
>
> "The Court: Do you mean that the Transit Companies, for a consideration paid to the City, were released of their obligation to resurface certain streets; and American, in its contract with Transit, had agreed, as a part of the consideration for the salvage, to resurface those streets, and consequently, your position is that American received that benefit that enured to the Transit Companies without paying any consideration therefore?
>
> "Mr. Janes: That is right."
>
> * * *
>
> "The Court: The remaining streets that had to be resurfaced by American, American was relieved therefrom by reason of Transit paying a consideration to the City of Minneapolis to be relieved of its initial [franchise] obligation, and therefore, a benefit was

bestowed on American that it was not entitled to in view of its contract with Transit, and Transit illegally or unlawfully gave it a benefit to which it was not entitled?

"Mr. Janes: Right." (Transcript of Proceedings of October 16, 1959, pp. 133-5).

Alternatively, the Government on the same occasion claimed that the fraud may have occurred *before* the enactment of the ordinance, as follows:

"Mr. Janes: * * * I would like to add to that, that we have evidence that American Iron had been relieved by the Transit Company of its paving obligations *prior* to the transaction with the City, between the Transit Company and the City relieving it of the obligation". (Id. p. 136; italics supplied.)

At the trial, the Government stated its first claim as follows:

"The Court: The enactment of this ordinance to the extent that American * * * was (not) obliged to repave didn't enure to the benefit of American * * *. That was a perfectly okay transaction between the streetcar company and the City of Minneapolis relieving the Transit Company of repaving these streets, is that right?

"Mr. Janes: That is right.

"The Court: Then your contention is that to the extent that American was obliged to repave and to the extent it was relieved of its obligation to repave, then the release obtained from the Transit Company was an incident here that you contend had some fraudulent aspects?

"Mr. Hyam Segell: Yes, sir, third party beneficiary." (V. 21, pp. 186-7).

In stating its alternative claim at the trial, the Government asserted that the parties had "abandoned" the removal contracts (V. 49, p. 203), and added that the removal contracts were only a "paper matter placed in the files, rather than a contract between two parties at arm['s] length intending to carry it out" (V. 42, p. 130), and were drawn in that form "to hide what was going on" (V. 43, p. 25).

The minutes of the proceedings leading to the enactment of the conversion ordinance (V. 50, pp. 125-147; V. 51, pp. 80-136) made it "crystal clear," as the court below concluded, that there was "no fraud", on the part of the representatives of the company in the "actual procurement or adoption of the ordinance" (App. p. 49).[4] There was uncontradicted evidence, moreover, that the Transit Company was released by the ordinance, not only of its obligation to repave the "surfaces" (which American Iron had assumed) but of its additional obligations to repave tie beds in poor condition and to clean and remove snow from streets along its routes (which American Iron had not assumed), with a resulting financial benefit to the Transit Company substantially in excess of the cost which it incurred under the ordinance (V. 21, pp. 45, 51, 55; Larrick Exh. 27, rec'd. V. 48, p. 44).

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[4] Faced with this evidence, the Government conceded in final rebuttal argument at the trial that the "conversion ordinance wasn't a part of any scheme" to defraud (V. 68, p. 65). The trial court nevertheless submitted to the jury the question of whether there was fraud in procuring the enactment of the ordinance, as hereafter set forth, and in the court below the Government claimed that its concession was in error and that there was in fact "fraud in the procurement of that ordinance." (Transcript of Oral Arguments of counsel, p. 128). The Government referred (id. pp. 128-30) to a letter from Harry Isaacs to Ossanna of July 28, 1953, which requested renegotiation of the removal contracts because of alleged excessive costs (Exh. HI-1 V. 9, pp. 55-7) and to the authority granted to Ossanna by the Transit Company on August 21, 1953, to renegotiate the contracts (V. 9, pp. 52-5), and claimed that,

In charging the jury, however, the trial court failed and refused to give an instruction requested by petitioners that

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October 1953 was procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company." (App. p. 46).

Instead, the court charged the jury that it was "the Government's position" that defendants schemed to relieve American Iron of its paving obligation "by the passage of the Ordinance" (App. p. 120), and instructed the jury to determine whether there was fraud in the passage of the Ordinance, as follows:

> "*What about the ordinance passed by the City of Minneapolis* to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? *Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract,* Government's Exhibit BZ?" (App. pp. 121-2, italics added).

The court separately submitted to the jury the alternative claim of the "Government" that "the parties never intended in good faith to go forward with the contracts according to their terms regarding the demolition of the system" (App. p. 121) as evidenced by, among other things, "relieving of

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while there was no evidence that the contracts were ever renegotiated, there was evidence that American Iron's operations had in fact been profitable and that Ossanna's motive in negotiating the enactment of the conversion ordinance was to relieve American Iron of its repaving obligations. As stated, however, the court below concluded that there was no fraud in the actual procurement or adoption of the ordinance.

American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance * * *" (App. p. 121).

Petitioners duly objected to the submission of the alleged over-all scheme and conspiracy to defraud by motions, made both at the conclusion of the Government's case and at the close of all the evidence, to strike as to them all evidence other than that relating to scrap (V. 41, pp. 57, 59-61, 79-89, 92-3; V. 60, pp. 192-3), to sever and grant petitioners a separate trial as to the scrap transactions (V. 44, pp. 42-4; V. 45, pp. 32-3; V. 60, p. 193), and for judgment of acquittal (V. 43, pp. 121-2; V. 60, p. 196), all of which were overruled, and duly excepted (V. 70, pp. 1, 6) to the trial court's instructions to the jury submitting the over-all scheme as to them (V. 69, pp. 53, 85-6, 94-5, 104-7, 111, 141-2). Petitioners also sufficiently reserved objection to the instructions given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instruction requested withdrawing from the jury the issue of fraud in the passage of the Ordinance (V. 70, pp. 4-5), as the court below concluded (App. p. 47).

Petitioner Fred Isaacs was convicted of conspiracy, and petitioner Harry H. Isaacs of conspiracy and on eight substantive counts, including five alleging mailings in furtherance of the alleged scheme to defraud and three alleging interstate shipments of scrap obtained by fraud. After motions for judgment of acquittal or a new trial were overruled (App. p. 67), petitioner Fred Isaacs was sentenced to imprisonment for a year and a day and fined $2,500.00, and petitioner Harry H. Isaacs was sentenced to four years' imprisonment and fined $1,000.00 on the mail fraud counts, to a concurrent term of four years and fined

$10,000.00 on the conspiracy and interstate shipment counts, and to pay one-half of the cost of prosecution.[5]

On appeal, the court below affirmed, observing that the trial was a protracted one (App. p. 11) and was presided over by an experienced and distinguished jurist (App. p. 65) and concluding that participation in the scrap transactions warranted a finding of knowledge of the overall conspiracy alleged and that, while there was no evidence of fraud in the actual procurement or enactment of the Minneapolis Conversion Ordinance, the convictions should be affirmed on another basis (App. pp. 49-51) more fully discussed below, *infra*, p. 21.

REASONS FOR GRANTING THE WRIT

1. The court below decided an important question affecting the reach of conspiracy prosecutions, and in a manner in conflict with the decisions of this Court.

In *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court set aside convictions of a single general conspiracy because of prejudicial error in permitting the jury to find a single conspiracy to obtain home improvement loans by fraud, where the evidence showed eight or more separate groups of loan applicants connected with each other only in that each dealt with a single common figure as their agent in applying for the loans.

In the court below, the Government conceded that the case of petitioner Fred Isaacs was governed by *Kotteakos*

[5] Prior to its charge to the jury, the trial court dismissed certain counts in No. 4-59-Cr 77, Count X, alleging a mailing relating to the transfer of certain real estate, and Count XIII relating to the Villaume transaction as well as Counts IV and XI relating to the Midcontinent transaction. The jury found petitioner Harry H. Isaacs not guilty on Counts VII, VIII and IX of that Indictment, alleging mailings and interstate wire communications relating to the Mexican note transaction, and found all defendants not guilty on Count XII thereof, alleging another mailing relating to the Villaume transaction.

unless he were sufficiently connected with the "over-all scheme" alleged,[6] and in the trial court stated that, absent a showing of such a scheme, there should be "a dismissal" of all the mail fraud and conspiracy counts (V. 43, p. 39).

The court below, however, held that the participation of petitioner Fred Isaacs in "one" of the "major" objectives of the conspiracy alleged was sufficient. The court said (App. p. 42):

> "The fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof, and, being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration."

The court upheld the conviction of petitioner Harry H. Isaacs on substantially the same basis (App. pp. 41-2).

The court so held, notwithstanding that the scrap transactions were not dependent on any others for their success and were not connected with them, though all the transactions occurred in the disposition of surplus property of various kinds and one or more of the Transit Company officers participated in all.

(a) An important question is thus presented whether the decision below unduly broadens the reach of conspiracy prosecutions. In *Grunewald v. United States*, 353 U.S. 391, 404 (1957), this Court stated that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping net of conspiracy prosecutions", as it had "repeatedly warned" in prior cases, and referred to Justice Jackson's familiar strictures against such prosecutions (see *Krulewitch v. United States*, 336 U.S. 440,

[6] Transcript of Oral Arguments of Counsel, pp. 117-19.

445 (1949) in concluding that "the important considerations of policy behind such warnings need not be again detailed", 353 U.S. at 404.

(b) The test of guilt applied by the court below is in conflict with those established by this Court.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Company v. United States, supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States, supra; Blumenthal v. United States*, 332 U.S. 539 (1947).

In *Ingram*, this Court renewed a prior warning that "evidence of knowledge must be clear, not equivocal", because "charges of conspiracy are not to be made out by piling inference upon inference" (360 U.S. at 680, quoting 319 U.S. at 711), and held that the collaboration of employees with their employers in concealing a gambling operation illegal under local law was "colorless" on the "vital issue of knowledge" of their employers' wilful evasion of federal tax liability, because the "criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted", 360 U.S. at 679.

In *Kotteakos*, moreover, this Court approved the ruling of the Court of Appeals for the Second Circuit (151 F. 2d 170, 173) that even knowledge by the petitioners that the common figure with whom they dealt was then engaged in similar transactions with others, was insufficient basis to support a finding of a common purpose (328 U.S. at 755),

and this on the ground, as the Court later explained, that except for the common figure, "no conspirator was interested in whether any loan except his own went through," *Blumenthal v. United States, supra,* at 558.

In *Blumenthal,* on the other hand, the Court upheld the conviction of several salesmen as participants in a single, illegal scheme to sell whiskey at over ceiling prices, where the "salesmen were aware that their individual sales were part of a larger common enterprise, *dependent* on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor" (id. at 555, n. 14, italics supplied).[7]

The decisions of this Court cited above forbid conviction of the conspiracy charged merely because of the relative size of the transactions embraced. The size of the scrap transactions, to which the court below referred, plainly gives rise to no inference that petitioners had any knowledge that there was a larger plan embracing other, fraudulent transactions, much less that they had any "purpose to further" any such larger plan. Cf. *Canella v. United States,* 157 F. 2d 470 (C.A. 9, 1946).[8]

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[7] In such cases, where each participant is a "necessary link in a scheme of distribution", *United States v. Bruno,* 105 F. 2d 921, 923 (C.A. 2, 1939), *rev'd. on other grounds, Bruno v. United States,* 308 U.S. 287 (1939), the courts give "recognition to . . . reality, namely, that there must of necessity be a division of labor and function by those engaged" in such a criminal business. *United States v. Rich,* 262 F. 2d 415, 418 (C.A. 2, 1959).

[8] In its opinion, the court below observed parenthetically that "(the scheme had its genesis in the handling of the scrap and had its demise in the scrap)" (App. p. 41). The court below, however, did not suggest that the fact that the scrap transactions were first in point of time rendered petitioners responsible for any additional objectives added later, and could not do so in view of the elementary principle that "(n)obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change" *United States v. Peoni,* 100 F. 2d 401, 403 (C.A. 2, 1938); *Hanis v. United States,* 246 F. 2d 781, 787 (C.A. 8, 1957), as the trial court in substance charged (V. 69, pp. 106-7).

(c) Petitioner Harry H. Isaacs also participated in the Midcontinent transaction, as the court below pointed out. But, as that transaction was not fraudulent as a matter of law (V. 69, p. 95), no inference may be drawn from his participation therein that he knew that the officers of the Transit Company with whom he dealt were guilty of fraudulent conduct in other transactions not involving the disposition of scrap.[9]

Harry H. Isaacs was also convicted of use of the mails to further the scheme to defraud, as well as of conspiracy. But the "scheme to defraud" alleged was identical with the conspiracy charged, and it was common ground at the trial and in the court below that the several transactions alleged as "parts" of both the scheme and the conspiracy could not, as to any defendant, properly be tried together in the one proceding, save on a showing that such defendant was sufficiently connected with the single scheme and conspiracy alleged (V. 69, pp. 104-7; App. p. 37).[10]

[9] The court below also pointed to the loan of $10,000.00 made by Larrick to petitioner Harry Isaacs on April 4, 1955, repaid with interest on September 21, 1955 (V. 39, p. 45) as evidence of the close relationship between the two (App. p. 41). However, the dealings between them in the scrap program provided "'more than sufficient reason" for that relationship, since Larrick was in charge of the Transit Company's scrap program (V. 4, pp. 137-9) and visited the American Iron scrap yards at least once a week (V. 18, pp. 111-13), *Ingram v. United States, supra* at 679. The relationship between the two was obviously no closer than that between Brown, the common figure in *Kotteakos v. United States, supra*, and the petitioner Kotteakos, who, in addition to making fraudulent loan applications of his own through Brown, forwarded to Brown like applications from others, *Kotteakos v. United States, supra*, at 754, or between the employers and their employees in *Ingram v. United States, supra.*

[10] The trial court permitted the jury to find petitioner Harry Isaacs guilty on three interstate shipment counts, without a finding that they were consummated in pursuance of the over-all scheme to defraud (V. 69, pp. 51-2). In the court below, the Government conceded that petitioner may have been prejudiced thereby if he was insufficiently connected with the over-all scheme alleged (Transcript of Oral Arguments of Counsel, pp. 157-8). The court

2. In finding no error or prejudice in the trial court's instructions on the issue of fraud in the Minneapolis Conversion Ordinance, the court below decided a further question of importance in the administration of criminal justice in the Federal courts, and in a manner in conflict with the decisions of this Court.

The court below found it "crystal clear" that there was "no fraud" in the "actual procurement or adoption of the ordinance," but recognized that the trial court's instructions "might be susceptible" to an interpretation permitting the jury to find the contrary. The court concluded, however, that there was no error in the instructions because such fraud "was never an issue," that the issue litigated was whether *before* the ordinance the parties had never intended to enforce American Iron's repaving obligations, so that the Transit Company was "later of necessity" forced to obligate itself to the City, and hence that the instruction "did not serve to misdirect the jury" (App. pp. 49-50).

Alternatively, the court held that any error was not prejudicial because to "assume that the jury found no fraud in the scrap transactions, even though the evidence of fraud, quite apart from the ordinance, was substantial, and that it did find fraud in the procurement of the conversion ordinance, where there was absolutely no evidence of fraud," would require the court to "indulge in the assumption" that the jury "lacked all common sense" (App. pp. 50-1).

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below found it unnecessary to consider this question, since the sentence imposed on these counts and the conspiracy count was a general one and the court below found petitioner was sufficiently connected with the over-all conspiracy alleged (App. p. 51). In the event the petition for certiorari is granted, we respectfully request leave to argue that it was prejudicial error to submit the interstate shipment counts along with the mail fraud and conspiracy counts in the absence of evidence to support conviction of the single scheme or conspiracy charged. Cf. *Schaffer v. United States*, 362 U.S. 511 (1960).

(a) The alternative ground of decision, that any error was not prejudicial, was plainly in direct conflict with this Court's decision in *Bollenbach v. United States,* 326 U.S. 607, 614 (1946), that error in a basic instruction is prejudicial, notwithstanding "abundant evidence" to support a finding of guilty on a proper theory, and ignored the "influence of the trial judge on the jury" in instructing the jury, in effect, that there was evidence of fraud in the enactment of the ordinance, *Starr v. United States,* 153 U.S. 614 at 626 (1894).

The initial holding below, that there was no error in the trial court's instructions, cannot be reconciled with this Court's explicit admonition that a "conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States, supra* at 613; *M. Kraus & Bros. v. United States,* 327 U.S. 614, 627 (1946); *Yates v. United States,* 354 U.S. 298, 327 (1957). The trial court's instructions admittedly were "susceptible" to an interpretation permitting the jury to find fraud in the actual procurement or adoption of the ordinance, a major issue at the trial. See, *supra,* pp. 11-13.

The conflict with the decisions of this Court is even plainer if it be assumed, as the court below concluded, that such fraud was never an issue at the trial. The court below did not question that an unequivocal submission of a claim not in issue or unsupported by any evidence would have been plainly erroneous. *Nash v. United States,* 229 U.S. 373, 380 (1913); *Quercia v. United States,* 289 U.S. 466, 470 (1933). The court, however, found in effect that the trial court's instructions were "equivocal" and could thus be construed as also submitting a claim that had been tried and was supported by evidence. It thus made a virtue of the very vice of equivocation specifically condemned in *Bollenbach.*

(b) The importance of the question presented needs no extended comment, "(i)n view of the place of importance that trial by jury has in our Bill of Rights," *Bollenbach v. United States, supra,* at 615. Only yesterday, in holding indictments for contempt of Congress fatally defective in omitting to state the subject under investigation at the time of defendants' refusals to answer interrogatories of a congressional subcommittee, this Court emphasized that the omission would enable "conviction to rest on one point and the affirmance of the conviction to rest on another," *Russell and others v. United States,* Nos. 8-12, 128, October Term, 1961, decided May 21, 1962.

We recognize, of course, that this Court will not grant certiorari merely to correct error. The decision below, however, in sanctioning acknowledged ambiguity in instructions on a basic issue, marks an important departure from the doctrine of *Bollenbach* and, indeed, completely subverts it. Of equal importance, the opinion of the court below reveals in every line an unmistakable tendency, which only review by this Court can restrain, to search the record for any basis, however strained and implausible, to sustain a verdict supported by evidence of guilt on some theory, in complete disregard of a basic policy that the question for an appellate court is "not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal courts," *Bollenbach v. United States, supra,* at 614, even if the "appellate court is left without doubt" that the appellant is "guilty," Id. at 615.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 15, 1962.

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In The

Supreme Court of the United States

OCTOBER TERM 1961

No. ~~1018~~ 188

BENSON M. LARRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM 1961

No.

BENSON M. LARRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1. The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.[1]

[1]The Joint Appendix is hereinafter cited as "App. p. .....". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. ..... p. .....", together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz., "Exh. BZ", those of defendants by the name of defendant and arabic number, viz., "Larrick Exh. 1", in accordance with the designation at the trial.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1962 (App. p. 114). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). Time for filing of petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254, and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether the existence of, and knowledge with a purpose to further, a single conspiracy with multiple objectives may be permitted as a matter of law to be found as against petitioner solely from his participation in some, but not all, of the conspiracies' major objectives, where the success of any one objective was not dependent upon the success of any other.

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was not supported by any evidence.

STATEMENT

This petitioner adopts and incorporates herein by reference the Statement of the Case made by petitioners Fred Isaacs and Harry Isaacs, who have likewise filed a petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit. To complete such Statement, it must be added that this petitioner duly objected to the submission of the alleged overall scheme and conspiracy to defraud by Motions, made both at the conclusion of the Government's case and at the close of all the evidence, to strike as to him all evidence other than that relating to scrap (V. 41, pp. 61, 79, 80, 83, 85, 87; V. 42, pp. 131, 132; V. 44, pp. 1-3; V. 45,

p. 27; V. 61, pp. 41, 42, 57), to sever and grant this petitioner a separate trial as to the scrap transaction (V. 45, pp. 26, 27) and for judgment of acquittal, all of which were overruled, and duly excepted (V. 70, p. 1) to the trial court's instruction to the jury submitting the overall scheme as to him. Petitioner also sufficiently reserved objection to the instructions given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instruction requested withdrawing from the jury the issue of fraud in the passage of the ordinance (petitioner Isaacs' requested instruction No. 16 joined in by this petitioner, V. 63, p. 28, and, as to the exception to the court's refusal to so charge, see V. 70, pp. 4, 5, 12) as the court below concluded (App. p. 47).

Petitioner was found guilty on six counts of mail fraud, (Counts I, II, III, V, VI and VII), two counts of wire fraud (Counts VIII and IX), three counts of interstate shipment of goods allegedly obtained by fraud (Counts XIV, XV and XVI) and conspiracy to commit these offenses (Count XVII). After Motions for Judgment of Acquittal or a New Trial were overruled (App. pp. 81, 86), petitioner was sentenced to imprisonment for two years and to pay a fine in the sum of $1,000 (a committed fine) as punishment for the offenses set forth in Counts I, II, III, V, VI, VII, VIII and IX, the sentence and fine to be a general sentence; and was sentenced to imprisonment for two years and to pay a fine in the sum of $2,000.00 (a committed fine) as punishment for the offenses set forth in Counts XIV, XV, XVI and XVII, the sentence and fine to be a general sentence, the penal sentence to be concurrent and not consecutive with

that imposed with respect to Counts I, II, III, V, VI, VII, VIII and IX (V. 72, pp. 52, 53).[2]

REASONS FOR GRANTING THE WRIT

1. The court below decided a question which is important because of its impact upon the scope of conspiracy prosecutions.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Company v. United States*, *supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States*, 328 U.S. 750 (1946); *Blumenthal v. United States*, 332 U.S. 539 (1947). These decisions would indicate, if they do not explicitly hold, that even the existence of such a single conspiracy may not be inferred solely from a series of transactions, no one of which is dependent for its success upon any other.

In *Blumenthal*, this Court affirmed convictions of a single conspiracy where each transaction was a stage in a chain of distribution, each of which was dependent for its success on all other stages of distribution, the participation in any part affording a basis for a finding of knowledge and a purpose to further the larger plan.

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[2]Prior to its charge to the jury, the trial court dismissed certain counts in No. 4-59-Cr 77, Count X, alleging a mailing relating to the transfer of certain real estate, and Count XIII relating to the Villaume transaction, as well as Counts IV and XI relating to the Midcontinent transaction. The jury found petitioner not guilty on Count XII, which alleged a mailing relating to the Villaume transaction.

On the other hand, in *Kotteakos*, this Court reversed conspiracy convictions of several defendants, each of whom dealt with a central figure in order to attain his own illegal end. There, as this Court later explained in *Blumenthal*, "* * * no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end * * *" (332 U.S. at page 558).

In *Ingram*, this Court held that where a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan, renewing a prior warning that "* * * evidence of knowledge must be clear, not equivocal * * *" because "* * * charges of conspiracy are not to be made out by piling inference upon inference * * *" (360 U.S. at page 680, quoting from *Direct Sales Company v. United States*, *supra*, at p. 703).

This case presents the important question not presented in *Ingram* or *Kotteakos*, whether knowledge and the purpose to further such a conspiracy may be inferred as against one who participated in some, but not all, of the transactions embraced in the one proceeding, where no one of the transactions in suit were dependent for their success upon any other, and guilt, if any, must be inferred solely from conduct with respect to some of the transactions.

None of the various transactions tried in this proceeding, scrap transfers, real estate sales, commission payments, Mexican Note commissions, or any other claimed illegal transaction, was dependent upon any other for its success. Yet, the trial court submitted the evidence as to all of these transactions against petitioner, including those in which he

did not participate (V. 69, pp. 32, 33, 44, 47, 49, 51, 53, 85, 93, 94, 104-111).

The trial of petitioner in such a proceeding violated the principle, if not the precise holding, of *Ingram* and *Kotteakos*, because there was no sufficient nexus between the several transactions and the trial of all the transactions in one proceeding presents the grave danger of "* * * transference of guilt from one (defendant) to another * * *." *Kotteakos v. United States*, *supra*, at page 774; *Schaffer v. United States*, 362 U.S. 511, 522-4, (per Douglas, J. dissenting, 1960).

The petitioner was plainly prejudiced. There was admittedly no evidence that petitioner profited financially from any of the transactions in suit, as the trial court instructed (V. 69, p. 111). Yet the jury was permitted to weigh against him that in the Hopkins right-of-way transaction, in which he did not participate (as the trial court instructed, V. 69, p. 105), a fellow officer and co-defendant received a profit, directly or indirectly, of $52,000.00 (V. 36, pp. 54-71, Exh. N-D-1). The jury was also permitted to weigh against petitioner evidence as to two commissions paid to Jeffords with which petitioner had no connection (admittedly an administrative assistant stamped his name on voucher authorizing payment as a matter of routine, without his knowledge (V. 38, pp. 131, 134-5, Exh. C-O) and which were handled by Jeffords in a manner to suggest a kick-back to some officer of the Transit Company (App. p. 84).

The evidence of Larrick's participation in other transactions, although we assume it to be sufficient for the purpose of this petition, was tenuous at best and was necessarily weighed by the jury in the light of evidence concerning other transactions, including those with which petitioner had no connection. Even the court below treated as significant that

petitioner joined in a Board resolution ratifying the sale of two lots from which Towey benefited, although on its face the resolution purported to authorize the sale to one Bernard Heintz and did not disclose his relation to Towey (Exh. C-X, V. 44, p. 148). With respect to the last, and largest, commission paid to Jeffords, the principal evidence of fraud (the minutes of an Executive Committee meeting of April 12, 1954, purporting to authorize an exclusive listing to Jeffords, which were claimed by the Government to have been fabricated, Exh. C-R, V. 38, pp. 111-3) was apparently not called to petitioner's attention until after the commission was paid to Jeffords (V. 38, pp. 139, 142-3). Even in the case of transactions as to which petitioner's connection was clear, the issue of fraud was necessarily adjudged by the jury in the light of evidence as to all the transactions in suit.

We recognize, of course, that where the transactions in which the accused participated are dependent for their success on that of others embraced in a larger plan of necessarily imprecise scope, the accused cannot complain that he was unaware of all the "details" of the larger plan (*Blumenthal*, at pp. 558-9). But where, as here, there is no interdependence upon any other transactions in suit, there is no basis for a finding that the accused had knowledge of any larger plan or any purpose to further it and hence no justification for subjecting him to the risk of "transference of guilt" from one (defendant) to another (*Kotteakos*, at p. 774).

The court below, we respectfully submit, has thus attempted to "broaden" the already pervasive and wide sweeping net of conspiracy prosecutions, *Grunewald v. United States*, 353 U.S. 391, 404 (1957), in disregard of warnings "repeatedly" given by this Court and the "important considerations of policy behind such warnings" (*id.* p. 404).

2. As to the second question presented, whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was not supported by any evidence, this petitioner adopts and incorporates herein the reasons for granting the Writ contained in the petition of Fred Isaacs and Harry Isaacs, from which this petitioner earlier herein adopted the Statement of the Case.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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FILED
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In The

Supreme Court of the United States

October Term 1952

No. [illegible] 189

EARL A. JETFORDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
[illegible]
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In The

Supreme Court of the United States

OCTOBER TERM 1961

No.

EARL A. JEFFORDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1.[1] The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.

[1]The Joint Appendix is hereinafter cited as "App. p. ....". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. ....., p. .....", together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz., "Exh. BZ", those of defendants by the name of defendant and arabic number, viz., "Jeffords Exh. 1", in accordance with the designation at the trial.

JURISDICTION

The judgment of the U. S. Court of Appeals which is here sought to be reviewed is dated March 22, 1962 (App. p. 115). A Petition for Rehearing was filed by petitioner on April 9, 1962, within the twenty-day period allowed therefor under Rule 15 of the Rules of the Court of Appeals (App. p. 117). The Court of Appeals denied said Petition for Rehearing on April 20, 1962. The time for filing petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254, and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Can a defendant be held to have knowingly joined, with a purpose to further, an alleged single conspiracy embracing as parts thereof various transactions and involving several defendants solely from his participation in a small part of the transactions alleged where admittedly the great bulk of the evidence concerned transactions with which he had no connection, and none of the various transactions tried together depended for their success on that of any other?

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was found by the Court below not to be supported by any evidence.

STATEMENT OF THE CASE

1. The Indictment.

Petitioner Earl A. Jeffords, together with Fred A. Ossanna, James H. Towey, Benson M. Larrick, Isadore Blumenfeld and Harry Isaacs, were named as defendants in an Indictment returned in the District of Minnesota, Fourth Division, No. 4-59 Cr. 77, alleging, in sixteen substantive and one conspiracy count, a use of the mails in furtherance of an alleged scheme to defraud in violation of 18 *U.S.C.*, Sec. 1341 (Counts I through VII and X through XIII), a use of interstate wire communications in furtherance of the same scheme in violation of 18 *U.S.C.*, Sec. 1343 (Counts VIII and IX), shipments in interstate commerce of certain scrap allegedly obtained by fraud in violation of 18 *U.S.C.*, Sec. 2314 (Counts XIV through XVI), and a conspiracy to commit these offenses in violation of 18 *U.S.C.*, Sec. 371 (Count XVII). Petitioner Earl A. Jeffords was charged only under the conspiracy count: Count XVII. The other defendants were charged with devising the alleged overall scheme to defraud the Transit Company in the sixteen substantive counts. They were also charged in the conspiracy count with Jeffords.

This Indictment (4-59 Cr. 77) was consolidated for trial with another Indictment, No. 4-60 Cr. 13, returned against Fred Isaacs and Theodore Landy charging each of them, in one count, of conspiracy essentially the same as that alleged in Count XVII of the first Indictment.

Petitioner Jeffords was found guilty of the conspiracy count with which he was charged and the other defendants (with the exception of Landy and Blumenfeld) were found guilty of certain of the substantive counts as well as the conspiracy count.

The Indictment alleged, and the proof of the Government

was concerned with, a number of separate transactions which it was claimed were simply "parts" of a single over-all scheme and conspiracy to defraud the Transit Company of the assets which became surplus and available for sale as a result of the conversion by the Transit Company from a streetcar to bus operation.

DESCRIPTION OF THE DEFENDANTS AND THE RELATIONSHIP BETWEEN JEFFORDS AND THE OTHER DEFENDANTS

Petitioner Earl A. Jeffords is a duly licensed real estate broker and has been engaged in this business in the City of Minneapolis for about fifteen years doing business under the trade name of J & C Holding Company (V. 38, p. 6). Jeffords knew the defendant Ossanna and did business with him both before, during and after Ossanna became associated with the Transit Company. Jeffords handled as a real estate agent the sale of two substantial properties owned by Ossanna, one of which was known as Culbertson's Cafe and the other a building in downtown Minneapolis (V. 37, pp. 91, 92). After leaving the Transit Company, Ossanna also consulted Jeffords in connection with a hotel owned by Ossanna in the City of Minneapolis (V. 38, p. 41). All of Jeffords' dealings with the Transit Company on the three pieces of real estate with which he was involved and received commissions were with the defendant Ossanna except that, as mentioned in the Opinion of the Circuit Court of Appeals (App. pp. 30, 32), Larrick and Towey, along with Ossanna, authorized the issuance of the commission checks and Towey, along with Ossanna, signed the exclusive listing agreement which was the basis for the payment to Jeffords of a commission on the Snelling University property.

As stated in the Circuit Court of Appeals Opinion (App. p. 43), "There were 'insiders,' Ossanna, Larrick and Towey; there were 'outsiders' among them, Harry Isaacs, Fred

Isaacs and Jeffords." Ossanna, Larrick and Towey were officers of the Transit Company. Harry Isaacs and Fred Isaacs were in the scrap business doing business as American Iron & Supply Company and American Salvage & Supply Company.

Other than as mentioned above, there was no evidence that Jeffords even knew Larrick or Towey. There was no evidence that Jeffords knew Harry Isaacs or Fried Isaacs (or Theodore Landy, who was also in the scrap business and was one of the original defendants although acquitted by direction of the Court).

THE EVIDENCE RELATING TO JEFFORDS

Before discussing the facts of the case insofar as they relate to petitioner Jeffords, it is worthwhile to briefly describe the transactions to which over 90 per cent of the trial time was devoted. The trial took 17 weeks and of this time less than one week was spent on the Jeffords commissions transactions. No attempt was ever made by the Government to show that Jeffords participated in any way in the other transactions or to show that he had knowledge of the other transactions or even knew the participants therein with the exception of the defendant Ossanna.

A large part of the trial was devoted to the scrap transactions which involved the demolition and removal by American Iron & Supply Company of railway track, copper trolley wire, overhead feeder cable, 20,000 wood and metal poles, the underground transmission and distribution cables and miscellaneous scrap. The scrap was also the subject of considerable testimony concerning erasures and reductions of weights in the weight tickets by American Iron & Supply Company (V. 22, pp. 70-82; V. 16, pp. 31-9).

The Circuit Court of Appeals stated in its Opinion (App., p. 12 and at p. 42):- "A large portion of the trial was con-

sumed in developing the methods and procedures adopted in the disposition of scrap property, having a very substantial value." • • • "the fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof."

The Minneapolis Conversion Ordinance dated October 30, 1953, provided for the payment by the Transit Company of $922,790.00 to the City of Minneapolis in return for which the Transit Company was released from its franchise obligations to remove rails and repave the streets from which rail was removed, street cleaning and snow removal. This ordinance also inured to the benefit of American Iron & Supply Company by relieving it of certain obligations to repave streets from which it removed rail.

The Mid-Continent transaction involved the purchase by Harry Isaacs, d.b.a. Mid-Continent Development Company, from the Transit Company of certain real estate, machinery and equipment.

The Mexican Notes transaction involved the sale by the Transit Company to one George Francis, at a claimed excessive discount, of notes guaranteed by the Mexican National Bank which had been obtained by the Transit Company as payment for streetcars sold to the Mexico City Transit System.

The Hopkins Right of Way involved a 3.6-mile abandoned streetcar line right-of-way sold by the Transit Company to one Walter N. Carlson for a claimed grossly inadequate consideration. Certain members of the family of Fred Ossanna entered into an agreement with Carlson after the sale and shared in the profits of the resale with Carlson. Jeffords and one Marvin Benjamin purchased a small piece of this property from Carlson and subsequently resold this piece at a profit.

The Villamme payment of $7,500.00 to the Ossanna Foundation from his commission of $37,500.00 paid by the Transit Company for procuring the purchaser for the University and Snelling property.

The Towey Lots involved the purchase by defendant Towey from the Transit Company of two real estate lots for the grossly inadequate consideration of $500.00. These lots were purchased by Towey in the name of his uncle, Bernard Heintz, and subsequently sold by Towey, masquerading as his uncle, for the sum of $5,500.00.

As mentioned previously, the evidence concerning the above transactions comprised almost all of the testimony in the case. All of these separate and unrelated transactions were admitted as against the defendant Jeffords on the theory of one over-all scheme to defraud the Transit Company knowingly joined and participated in by petitioner Jeffords. This, despite the fact that no attempt was ever made to show that Jeffords dealt with anyone other than Ossanna and had no participation in or awareness of such transactions.

In its instructions to the jury, the trial court stated (V. 69, p. 10[illegible]. "There is no evidence that Jeffords participated in any transactions except his commission deals and some dealing in the Hopkins Right of Way."

Jeffords received $107,500.00 in real estate commissions from the Transit Company in connection with the sale of three of the many Transit Company properties which became surplus as a result of the conversion by the Transit Company from a streetcar to bus system. This consisted of a $75,000.00 commission on the sale of the Snelling University property, a $20,000.00 on the sale of the Currie Avenue Garage and a $12,500.00 commission on the sale of the steam plant (Cir. Ct. of Appeals Opinion, App., pp. 30-32). Although petitioner feels that many of the undisputed facts evidencing a lack of fraud in connection with these commissions were

overlooked by the Circuit Court of Appeals, petitioner recognizes that the Supreme Court will not grant certiorari to review the finding by the Circuit Court that there was evidence from which the jury could find such commissions fraudulent. For that reason, petitioner Jeffords will describe only the facts concerning the matters relied upon by the Circuit Court to sustain its finding that Jeffords knowingly joined an over-all conspiracy encompassing all of the transactions described above. The only basis mentioned in the Opinion of the Circuit Court for so holding is as follows (App., p. 42):

> "The role of appellants Fred Isaacs and Jeffords, charged with and convicted of participation in the over-all scheme, under the conspiracy count, while less prominent, was nevertheless important and essential in carrying out the scheme. * * * Jeffords was a close associate of Ossanna and manifested more than a passing interest in the affairs of the company. As a shareholder he became a member of Ossanna's Stockholders' Committee, which was successful in its endeavor to place Ossanna in control. As we have noted, he profited to the extent of $14,000.00 in the transactions involving the Hopkins Right-of-Way. His manipulations assisted in effecting the over-all scheme whereby the company paid to him a large sum of money without any consideration or benefit inuring to it."

Jeffords' name, along with approxamately 75 other shareholders, appeared on the Ossanna Shareholders' Committee letter (Govt. Ex. O-J), which solicited proxies for Ossanna in his attempt to oust the Green management at the Stockholders' Meeting of December 18, 1950. The only defendants whose names appeared on this letter are Jeffords, Towey and Ossanna. Jeffords was the owner of only a nominal number of shares (Govt. Ex. O-I). There was no evidence that Jeffords ever did any act to further the efforts of the Committee to unseat the Green management or that he in any way participated in the affairs of the company. The letter was in con-

nection with the Stockholders' Meeting of December 18, 1950. The over-all scheme alleged by the Government has its beginning in the scrap transactions of 1951 (Opinion of the Circuit Ct., App., p. 40) approximately three years before the first Jeffords commission transaction.

It is true that in addition to the Jeffords commissions transactions, the evidence shows some possible involvement by Jeffords in one of the other alleged objectives of the conspiracy, namely the Hopkins Right-of-Way.[2] For the purpose of this petition, it is assumed there was sufficient evidence to show some connection between petitioner and the Hopkins Right-of-Way but it was at best tenuous and was weighed by the jury in the light of evidence as to numerous other transactions with which petitioner admittedly had no connection or knowledge or purpose to further, and which occupied the bulk of the trial.

As stated above, the above two matters (the appearance of Jeffords' name on the Shareholders' Committee letter and Jeffords' connection with the Hopkins Right-of-Way) are the only facts relied upon by the Circuit Court of Appeals to support the finding that Jeffords knowingly joined, adhered to, and participated with all of the other defendants in a single over-all scheme to defraud the Transit Company.

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[2] There was uncontradicted evidence from which the jury could find that Benjamin had interested Jeffords in purchasing a portion of this right-of-way for a filling station site (V. 51, p. 37) and that at the time he was unaware that this property was a part of the Hopkins right-of-way (V. 51, p. 57). That of the $14,000.00 profit made by Benjamin and Jeffords on the resale of the portion they purchased from Carlson, $6,000.00 of the profit resulted from the sale of a part of the property to a purchaser found by Benjamin after many months (V. 51, pp. 42-3). Benjamin devoted considerable time in trying to get the remaining portion of the property zoned commercial without success (V. 51, pp. 45-6; V. 35, pp. 107-8). The additional $8,000.00 made by Benjamin and Jeffords resulted from the real estate agent for Carlson locating a purchaser and inducing Carlson to repurchase this unzoned portion from Benjamin and Jeffords (V. 35, pp. 86, 112, 114). This agent was successful in having the property zoned commercial.

The trial court apparently relied only on the Hopkins Right-of-Way matter in stating in its Opinion denying the motion of petitioner for a new trial, "Jeffords did have an interest in the Hopkins Right-of-Way which he disposed of to Carlson." (App., p. 75.)

The other petitioners have discussed in detail the facts concerning the Minneapolis Conversion Ordinance relating to the second "question" presented by petitioner and petitioner respectfully requests permission to incorporate said discussion by reference in this writ.

Petitioners duly objected to the submission of the alleged over-all scheme and conspiracy to defraud by motions, made both at the conclusion of the Government's case and at the close of all the evidence (V. 41, pp. 57, 59-61, 79-89, 92-3; V. 60, pp. 192-3), to sever and grant petitioner a separate trial (V. 45, p. 35), and for judgment of acquittal (V. 59, p. 167), all of which were overruled, and duly excepted (V. 70, pp. 1, 6) to the trial court's instructions to the jury submitting the over-all scheme as to them (V. 69, pp. 53, 85-6, 94-5, 104-7, 111, 141-2). Petitioners also sufficiently reserved objection to the instruction given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instructions requested withdrawing from the jury the issue of fraud in the passage of the ordinance (V. 70, pp. 4-5). Petitioners all adopted the motions and requests for instructions made by the others.

REASONS FOR GRANTING THE WRIT

I.

The court below decided an important question affecting the reach of conspiracy prosecutions, and in a manner in conflict with the decisions of this Court.

In the case of *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court held that the mass trial of a number of defendants on separate conspiracies, joined together only by one key figure common to all, prejudiced such defendants in making their defense. The Indictment charged one single conspiracy to obtain loans under the National Housing Act by means of fraudulent misrepresentations. The evidence showed that each of the applications was separately made and that there was no connection between the applicants except that they dealt with one "common and key figure," one Simon Brown, and that each had no interest in furthering the application of the others. The Court rejected the Government's argument that as to each defendant the evidence was sufficient, and that none was prejudiced because the jury exercised discrimination, acquitting some and convicting others. The answer to this contention, the Court held, was that there (as here), the trial court had instructed the jury that there was "but one conspiracy" and that to convict any defendant the jury must find that he was "a member of that conspiracy." The Court said (328 U.S. 750, at 768-9, 772-3, 90 L.Ed. 1557, at 1568-9, 1571):

> "On its face, * * * this portion of the charge was plainly wrong * * * and the error pervaded the entire charge. * * * The jury could not possibly have found, upon the evidence, that there was only one conspiracy. The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the

similarity of purpose presented in the various applications for loans.

"This view, specifically embodied throughout the instructions, obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character. It may be that, notwithstanding the misdirection, the jury actually understood correctly the purport of the evidence, as the Government now concedes it to have been; and came to the conclusion that the petitioners were guilty only of the separate conspiracies in which the proof shows they respectively participated. But, in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference." * * *

"Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when, of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass."

Finally, the Court held it immaterial that the guilt of each defendant of a separate offense was "clear" and "manifest", in the absence of evidence that he adhered to a single overall conspiracy, and stated (328 U.S. 750, at 775-6, 90 L.Ed. 1557, at 1572):

"We have had regard also for the fact that the Court of Appeals painstakingly examined the evidence relating directly to each of the petitioners; found it convincing to the point of making guilt manifest; could not find substantial harm or unfairness in the all-pervading error or in any particular phase of the trial; and concluded that reversal would be a miscarriage of justice.

> "With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record.
>
> "It may be, as the Court of Appeals found, that the evidence concerning each petitioner was so clear that conviction would have been dictated and reversal forbidden, if trials for each offense or in one or more substantially similar to the Berger trial in the number of conspiracies and conspirators involved. But whether so or not is neither our problem nor that of the Court of Appeals for this case. That conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of Sec. 269. We think it highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict."

It would seem impossible to avoid the application of the above principles to petitioner Jeffords.

At the close of the Government's case, the trial judge stated to Government counsel that "here, of course, you have, in a way, several different conspiracies rather than one entire conspiracy. That's the difficulty, I think, in the lawsuit." (V. 41, p. 78).

The decision of the court below goes further in its application to Jeffords than to any other defendant. The Jeffords real estate commissions transactions were completely separate and isolated from other transactions, not dependent upon them for their success and not a "major" objective of the conspiracy alleged (as the Court indicated was the case with Fred Isaacs—App., p. 42).[3]

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[3] "The fraudulent disposition of the scrap became and was one of the major objectives of the scheme; it was part and parcel thereof, and, being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration."

(a) An important question is thus presented whether the decision below unduly broadens the reach of conspiracy prosecutions. In *Grunewald v. United States*, 353 U.S. 391, 404 (1957), this Court stated that it would "view with disfavor attempts to broaden the already pervasive and wide sweeping net of conspiracy prosecutions," as it had "repeatedly warned" in prior cases, and referred to Justice Jackson's familiar strictures against such prosecutions (see *Krulewitch v. United States*, 336 U.S. 440, 445-58) (1949) in concluding that "the important considerations of policy behind such warnings need not be again detailed," 353 U.S. at 404.

(b) The test of guilt applied by the court below is in conflict with those established by this Court.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Co. v. United States*, *supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States*, *supra*; *Blumenthal v. United States*, 332 U.S. 539 (1947).

In *Ingram* this Court renewed a prior warning that "evidence of knowledge must be clear, not equivocal," because "charges of conspiracy are not to be made out by piling inference upon inference" (360 U.S. at 680, quoting from 319 U.S. at 711) and held that the collaboration of employees with their employers in concealing a gambling operation illegal under local law was "colorless" on the "vital issue of knowledge" of their employers' wilful evasion of federal tax liability, because the "criminality of the enterprise under lo-

cal law provided more than sufficient reason for the secrecy in which it was conducted," 360 U.S. at 679:

"In the instant case there is no basis in the Opinion of the Court below for finding that Jeffords knew the "common and key figure" (Ossanna) was engaged in other transactions. However, even if there were such a basis, this Court in *Kottakos* approved the ruling of the Court of Appeals for the Second Circuit (151 F.2d 170, 173) that even knowledge by the petitioners that the common figure with whom they dealt was then engaged in similar transactions with others, was insufficient basis to support a finding of a common purpose (328 U.S. at 755), and this on the ground, as the Court later explained, that except for the common figure, "no conspirator was interested in whether any loan except his own went through," *Blumenthal v. United States, supra*, at 558.

It is submitted that the decision of the Court below as to Jeffords greatly widens the scope of conspiracy and can be cited to justify the mass trials of many defendants having no connection with each other and involving numerous unrelated transactions.

II.

In finding no error or prejudice in the trial court's instructions submitting the question of whether there was fraud in the procurement of the Minneapolis Conversion Ordinance, the court below decided a further question of importance in the administration of criminal justice in the federal courts, and in a manner in conflict with the decision of this Court in *Bollenbach v. U. S.*, 326 U.S. 607, 612 (1946). Petitioner incorporates by reference the argument made on this question in the petitions of Harry Isaacs and Fred Isaacs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 194

FRED A OSSANNA
~~ISAACS, et al~~ 2

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF FRED A. OSSANNA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ISAACS, *et al.*, *vs.* UNITED STATES OF AMERICA	No. ....

PETITION OF FRED A. OSSANNA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Fred A. Ossanna, an appellant in the above entitled case, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in that case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed at page 1 in a separately bound Appendix submitted jointly by all the defendants. The opinion of the District Court in response to a series of motions made by defendants subsequent to the verdict is not reported and is printed in the Appendix, p. 67.[1]

[1]The Appendix is hereinafter cited as "App. p. ". The review below in accordance with the procedure in the Eighth Circuit, was had on the original papers and the typewritten transcript of the proceedings in the trial court. These consist of seventy-two (72) numbered, typewritten volumes, cited herein as "V. , p. "; together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz. "Exh. BZ", those of defendants by the name of defendant and arabic number, viz. "Ossanna Exh. 1", in accordance with their designation at the trial.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1962 (App. p. 1). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). The time for filing of a petition for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Did the court below err in failing to give effect to the principle enunciated by this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946) that prejudicial error results where there is a variance between (a) the indictment which alleges a single over-all conspiracy with multiple objectives and (b) the proof that only supports a series of conspiracies. It is obvious in this case that there is no evidence as a matter of law which can support the existence of a single conspiracy. The objectives of the several conspiracies were independent of each other and the achievement of any of them did not hinge upon the achievement of any other.

2. What effect does the existence of that prejudicial error have upon the conviction of those conspirators who were central to the separate conspiracies that were proven?

3. Did the court below correctly hold that dual instructions given by the trial judge to the jury, one alternative of which had no evidence to support it, was not error and, if regarded as error, was not prejudicial error?

REASONS FOR ALLOWANCE OF THE WRIT

1. The first question turns upon the issue as to whether the court has decided the federal question therein involved in conflict with the applicable decision of this Court in *Kottcakos* v. *United States*, *supra*.

2. The second question, raised only if the first issue is decided in petitioner's favor, and therefor naturally not decided by the court below, posits an important question of federal law which has not been, but should be decided by this Court. Also, the decisions of the Courts of Appeals for the Ninth Circuit and for the Second Circuit are in apparent conflict on the resolution of the problem it presents.

3. The third question involves the sanctioning by the lower court of a departure from the accepted and usual course of judicial proceedings (*Bollenbach* v. *United States*, 326 U. S. 607 (1946)) so as to call for an exercise of this Court's power of supervision.

STATEMENT OF FACTS

In order to ease this Court's burden, this petitioner adopts for the purposes of this petition, the summarization of the involved facts in this case as set forth in the petition for certiorari herewith filed by Fred Isaacs and Harry Isaacs, co-defendants in this case. However, purely for the mechanical convenience of the Court, the petitioner has set forth this summarization in an Annex to this petition. Wherever an argument turns on features of the case related individually to this petitioner, calling for an elaboration of the facts there stated, these will be specifically shown by references to the Appendix or the Record.

Petitioner Ossanna, like the other petitioners, has reserved his rights to raise the issue which it requests this Court to consider. A motion was made in his behalf for

acquittal both at the close of the Government's case in chief on the ground that as a matter of law no single over-all scheme to defraud was sustainable (V. 43, p. 112). Petitioner also moved for a severance and to stand trial with respect to the issues raised severally by the several transactions (V. 43, p. 112). The former motion was renewed at the close of all the proofs and evidence (V. 61, p. 1). Petitioner again excepted to the trial court's submitting the issue of the single over-all scheme to the jury (V. 70, p. 1), and renewed this motion after the verdict (Index Rec. App. No. 125, p. 1692). Petitioner also excepted to the trial court's refusal to grant the requested instruction that fraud was not involved in the procurement of the Minneapolis Conversion Ordinance (V. 70, p. 9).

Petitioner was found guilty on six counts of mail fraud (Counts I, II, III, V, VI and VII), two counts of wire fraud (Counts VIII and IX) and was given a general sentence of four years and a committed fine of One thousand ($1,000) Dollars. He was also found guilty on three counts of interstate shipment of goods allegedly obtained by fraud (Counts XIV, XV and XVI) and on a count of conspirary to commit these offenses (Count XVII). He was given a general sentence of four years to be served concurrently with the prior sentence, together with a committed fine of Ten thousand ($10,000) Dollars. Petitioner was acquitted on one count of mail fraud (Count XII).

BRIEF IN SUPPORT OF PETITION

1. The Applicability of the Kotteakos Doctrine

This Court is not only aware, but has exercised its jurisdiction frequently to make the lower federal courts aware of certain inherent dangers present in the mass trial of defendants on a conspiracy charge. *Grunewald* v. *United States,* 353 U. S. 391, 404 (1957); *Scales* v.

United States, 367 U. S. 203,223 (1961). As all courts have so frequently observed, the partnership in crime, essential to the existence of a conspiracy, is rarely conceived except secretly and proof of that partnership has normally to be inferred from the overt acts. Such acts however criminal they may be when viewed separately, must have a setting in an atmosphere of conception and direction by two or more individuals in order to constitute the crime of conspiracy. *Grunewald v. United States*, *supra*, 402. The records of the common law are replete with instance after instance of the abuse of the charge of conspiracy. It was used to strike down combinations of laboring men endeavoring to exert their collective bargaining power in order to improve their status even until the mid-nineteenth century. *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 10 (1721); *People v. Melvin*, 2 Wheeler C. C. (N. Y.) 262 (1810); *People v. Fisher*, 14 Wendell (N. Y.) 1 (1835). Its use, particularly when the common law required no proof of an overt act, to maintain in power a ruling clique against an opposing element is historic and marred the essential fairness inherent in our system of law until changes were made in that doctrine, for which this Court has been largely responsible. Indeed, the very charge of conspiracy conjures up in the lay mind the conception of cabals, secret meetings, and designs of a group of persons to subvert the state or the *mores* of a community. It is for this reason that so frequently prosecutors in behalf of the Government tend to include a conspiracy count in an indictment that otherwise merely charges substantive offenses on the part of two or more individuals, despite the absence of some real evidence that the motivating forces behind the individuals had a common interest or purpose.

This is such a case. Taking all the evidence at its worst, it can establish only a series of conspiracies by

officials of a local transit company in combination with various other persons to dispose of surplus property of that company at prices less than their market value. As a normal incident of such conspiracies, the mails, the rails and the telegraph were utilized, just as they must be utilized in practically every ordinary transaction in life. But their use was only incidental to whatever transpired. It was not employment of these means to effect a fraud. The effectuation of the fraud did not necessarily require the use of those very instrumentalities provided or protected by the federal government. Indeed, to take the theory underlying the Government's case, as demonstrated by the first four counts of the indictment, any fraud committed by the officers of any company depriving it of any of its assets makes the statement of the assets on its balance sheet fraudulent, despite the fact that their non-existence could not be discoverable by independent certified public accountants. This then constitutes a federal crime if that balance sheet, in the normal course of events, is sent through the mails. This expansion of federal authority has enormous and powerful implications to the conceptions of federalism which have been the enduring core of this nation for the years of its existence. If a conspiracy to waste the assets of a local transit company was committed by the petitioner and others, the punishment of that conspiracy should obviously be a responsibility of the local government, and not assumed by the federal government simply because the mails, the rails or the telegraph were incidentally employed. It is not enough to say that some stockholders in the company charged to be defrauded were residents of other states. This is true of practically any company whose securities are publicly held. In this local transit situation, the rise or fall of the Transit Company, the scope of its franchises, the rates it could charge, the burdens it had to assume, the records it had to keep, were a responsibility of the State of

Minnesota and not of the Federal Government. *Cf. Parr* v. *United States*, 363 U. S. 370 (1960); *Kann* v. *United States*, 323 U. S. 88 (1944).

This, of course, is not in itself a legal argument. *United States* v. *Young*, 232 U. S. 155 (1914). But it bears directly upon the legal issues involved in this petition for this Court's consideration of the ultimate fairness of the trial accorded to this petitioner. For it is through the incidental use of the mails, the rails and the telegraph that the Government has woven together a series of transactions between officials of the Transit Company and a series of other individuals utterly unrelated as among themselves and charged an over-all scheme and conspiracy to "loot" the Transit Company of property made surplus by its conversion from a street-car to a bus operation.

Eleven co-conspirators were named; others were unnamed. Of these eleven, eight were indicted, of whom seven were tried below together; two were acquitted, and petitioner and four others convicted. All five of those convicted are seeking review by this Court of the judgments entered against them. Of the eight named defendants, petitioner and Larrick (another petitioner) and Towey, whose trial was postponed because of his illness, were officials of the Transit Company. Blumenfield was a character of a very unsavory reputation, particularly in the Twin Cities area. He had been convicted a few months earlier in the very Courtroom in which this case was tried in a sensational case for violating the White Slavery Act.* See

*The Government in its brief in the court below argued that the court could take judicial notice of this fact as well as of the later conviction of Blumenfield together with his two brothers and two associates of a conspiracy to defraud the government and also of the fact that Blumenfield had pleaded guilty to a conspiracy to influence a juror during that trial. (Govt. Brief, p. 10, fn. 5). The argument of the Government as to the relevancy of these matters, despite Blumenfield's acquittal in this case, was that "the

Blumenfield v. *United States*, 284 F. 2d 464 (C. A. 8 1960), *cert. den.*, 365 U. S. 812 (1961). Blumenfield happened to have been a stockholder in the Transit Company and had shown some interest in the affairs of the company. He was acquitted on all counts because of the lack of any evidence relating to the charged conspiracy. The two Isaacs and Jeffords were not employees of the Transit Company but were outsiders as was Landy who was acquitted. The other co-conspirators not named as defendants, namely, Francis, Aune and Carlson, were also outsiders. None of the outsiders, or others named as having participated in transactions charged to have been fraudulent, such as Villaume and Towey, were shown to have had any business transactions with each other or to have known of the transactions that each of them had with the officials of the Transit Company. (The two Isaacs and Landy, as officers and employees of American Iron, of course, knew each other.) There is a possible exception relating to a transaction between Jeffords and Carlson detailed in the Isaacs petition at p. 9, fn. 2. The one bond between the outsiders is that each of them dealt with one or more of the individual Transit Company officials and that each transaction they entered into related to property of that Company made surplus by the conversion to bus operations consisting either of scrap, real estate or securities. The other thing they had in common (although no proof of this fact exists with respect to Towey) is, what all of us have in common, namely, the normal use of the mails, the rails or the telegraph.

Obviously this single nexus of the acquisition of surplus property from those officials of the Transit Company, who had the authority and the responsibility to dispose of that

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underlying influence of Blumenfield pervades every aspect of the conversion fraud" (Id. p. 15). This is but a sample of the mood that characterized this prosecution. See *e.g.*, App. pp. 59-65; 82-86.

property, in a series of transactions, none of which were related to each other.* However fraudulent each one may have been deemed to be, would not of itself as a matter of law support the evidence of a single all-out conspiracy or scheme on the part of the few convicted defendants. Otherwise the doctrines enunciated by this Court in *Kotteakos* v. *United States*, *supra*, and *Ingram* v. *United States*, 360 U. S. 672 (1959) are meaningless. *Blumenthal* v. *United States*, 332 U. S. 539 (1947) is not to the contrary. In distinguishing the facts in that case from those in *Kotteakos* —a distinction equally applicable to *Ingram*—the Court at page 558 said that the salesmen were "aware that these individual sales were part of a large common enterprise, dependent on the carefully evolved arrangements to give the sales a guise of legitimacy, to dispose of a larger share of liquor." The grounds for the distinctive features in *Blumenthal* are carefully set out in the Court's opinion. It said (p. 558) that in that case the "salesmen knew or must have known that others unknown to them were sharing in so large a project", whereas in speaking of the *Kotteakos* case the Court said: "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise in procuring another's loan. The conspiracies therefore were distinct and disconnected . . ." *Ibid* The situation in the instant case fits that description. None of the "outsiders" was interested in whether any transaction but his would go through; none aided in any way, by agreement or otherwise, in assisting others in effecting a purchase of any surplus property. The successful pursuit of one transaction had no bearing on the successful pursuit of another.

*The possible exception of the Jeffords-Carlson transaction has been noted above.

The prejudice that attaches to the charging of distinct and disconnected conspiracies as a single over-all conspiracy is obvious. It permits "piling inference upon inference", *Direct Sales Co. v. United States*, 319 U. S. 703, 711 (1943); "the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate:" *Kotteakos v. United States, supra*, at 766-7; "the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Id.* at 774.

2. The Position of the "Insiders" under the Kotteakos Doctrine.

But if the "outsiders" are deemed to have been prejudiced by being tried for a single conspiracy involving distinct and disconnected transactions, each of which may be a separate conspiracy, the "insiders" such as the petitioner and Larrick, who participated in all or most of the separate conspiracies in that all of them concerned transactions with the Transit Company and the "insiders" were officials of that Company, are equally prejudiced. The burden of their defense is equally increased. With respect to them as well, the danger of the transference of guilt is equally present; the piling of inference on inference is equally possible.

This case illustrates that very fact. The transaction with respect to the Towey lots, detailed in the Isaacs petition at pages 23-24 of the Annex illustrates this exact danger. Admittedly petitioner was in Florida at the time the contract

was made for the sale of these lots between the Company and Towey, posing as "Heintz". The trial judge, who certainly of all the judges who have dealt with this case, had more opportunity to acquaint himself with the facts, charged the jury as follows: "There is no evidence that Ossanna participated in the Towey transaction." (V. 69, p. 105). What the jury determined as to this particular transaction is, of course, unknown. But the court below found that the evidence supported a finding that Ossanna, who was never shown to have had any knowledge that Towey was masquerading as "Heintz", participated in this transactions because "at a meeting of the board of directors of the Company, [he] made the motion whereby the board was persuaded to approve the sale to Towey" (App. p. 34). No such motion was ever made before the board by Ossanna. The motion Ossanna made was one to approve the sale of these lots to Heintz not Towey. (Exh. CX, V. 44, p. 148.) Had Ossanna made the motion the court below said he made, a connection between him and Towey could be inferred, but under the circumstances no such inference is even vaguely possible. If a transference of guilt is so easily made by the learned court below, the possibility of such transferences by the jury, far more serious in character, can easily be surmised.

Towey, Ossanna and Larrick, participated in most of the transactions involved in the conspiracy charged. They may be deemed "central figures" in the sense that Brown was so characterized in the *Kotteakos* case, and what was there deemed to be prejudicial error against the defendants might be argued to be "harmless" as against Brown. But in the *Kotteakos* case no such issue was raised since Brown had pleaded guilty and was not one of the petitioners. To counsel's knowledge the precise question of how to treat the guilt of the central figure has never been determined by this Court in a *Kotteakos* situation. It was before the Court

of Appeals for the Ninth Circuit in *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9, 1946), where the Court upheld the conspiracy conviction with regard to a central figure who had participated in *all* the separate conspiracies. Its brief conclusion that the "central figure" was not prejudiced, despite the admission of a variance between the indictment and the proof, fails to convince. A contrary conclusion was reached by the Court of Appeals for the Second Circuit in *United States* v. *Russano*, 257 F. 2d 712 (C. A. 2, 1958) on slightly different grounds but involving essentially the same principle. There two defendants were convicted of a single conspiracy continuing from 1951 to 1957, but the evidence only established two conspiracies in which both defendants were involved, one in 1952 and the second in 1955-6. Both conspiracies concerned traffic in narcotics. The appellate court reversed the conviction on the basis of the *Kotteakos* case but, since the proof was sufficient to support a conviction for either 1952 or 1955-6, declined to dismiss the indictment; instead remanding the case for a new trial.

Shaffer v. *United States*, 362 U. S. 511 (1960) throws little light on this problem for there the "central figures" again either pleaded guilty or the charges against them were *nolle prossed* at trial and further the conspiracy count was dismissed for lack of proof. However, that case—a five-to-four-decision—raises a serious issue of when joinder of defendants becomes prejudicial.

It can hardly be contended that, after applying *Kotteakos* and reversing as to the outsiders, the judgment should stand as regards the two insiders on the ground that the conspiracy alleged as to them was a single conspiracy. True, the jury can, as it did in this case, find with reference to a conspiracy that certain of the indicted conspirators are not guilty but that the others are. But *Kotteakos* is not based on this principle. Its base lies in prejudice to the defendants; not

on the innocence of those who were found not to have conspired by the jury. The variance between the indictment and the proof still exists and still remains prejudicial to all the conspirators who have been found guilty. The logic of *Kotteakos* is as equally applicable to the insiders as to the outsiders.

3. The Equivocal Instructions to the Jury

Material to the Government's position on the matter of the fraudulent transactions between the Transit Company and American Iron was the passage on October 30, 1953 of the Minneapolis City Ordinance (App. p. 87) which ordinance in return for a consideration paid by the Transit Company permitted that Company to discontinue the operation of its street cars and absolved it of other important obligations, including the repaving of streets from which the rails had been removed. That latter provision obviously benefitted American Iron with respect to its obligations under its contract with the Transit Company (App. p. 101-110) to resurface streets "as required by all City Ordinances . . ." (App. 103, p. para. 3) from which the rails had been removed.

The Government contended that the Transit Company and American Iron from the inception of the original contract of February 11, 1952 and its addenda had no intention of performing them and that the conversion ordinance in relieving American Iron as a third party beneficiary of its obligation to repave was a step in the consummation of the fraudulent scheme so initiated to sell scrap. For the purposes of this petition we accept the finding of the court below that the Government made no charge that the procuring and adoption of the ordinance was accomplished through fraud. The Court specifically found that no such contention had been made as well as the fact that there was

no evidence of "fraudulent conduct on the part of the city officials or representatives of the Company with respect to the adoption of the conversion ordinance" or in its procurement (App. p. 49). However, the trial court in its instructions to the jury told the jury to determine (a) whether the procurement and adoption of the ordinance was "a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract," (V. 69, p. 137; App. p. 120) and also (b) whether the parties had ever intended in good faith to go forward with the contracts as evidenced, among other things, by the "relieving of American from its obligations to remove the rails and to repave by the initial Minneapolis City Ordinance" (V. 69, p. 89; App. p. 121). The appellate court recognized that the instruction summarized in (a) above might be "susceptible" to the interpretation that the ordinance was procured through fraud, but held that (1) in "the light of the issue litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or *submit an issue that was not supported by evidence* (italics ours)" (App. 50)—despite its finding a moment earlier that it was "crystal clear" that no fraud attended the procurement and adoption of the ordinance (App. 49). Hence it concluded there was no error in the instruction. It went on, however, to say that, assuming there was error, the error could not have been prejudicial since the jury could not have based a verdict on evidence that simply did not exist (App. 50-1).

This is the type of equivocal misdirection of juries that falls within the category of prejudicial error as illustrated by *Bollenbach* v. *United States, supra,* and *Yates* v. *United States,* 354 U. S. 298 (1957). Particularly is this true in a case such as this where not only were the facts extremely complicated, but serious complications attended

the theories upon which guilt was predicated. True, the equivocal instructions related to one fact from which guilt might be inferred, but it is impossible to be certain that the jury was not misled since there was no evidence to support the alternative finding under (a) above. The evidence to support a finding pursuant to the instruction under (b) above, required a rather tortuous conclusion that would make the ordinance, which was shown to be financially beneficial to the Transit Company (Larrick Exh. 27), the capstone of a conspiracy charged to have come into being a year and a half previously—a conspiracy contemplating even then this very action by the City. As the Court observed in *Bollenbach, supra,* at 614, the belief of the appellate court that defendants were guilty and that sufficient evidence thereof could be spelled out of the record, is not the way in which justice is to be had under our system of law. The procedures under which jury findings are made, must first be fair. Only then can a court be satisfied that justice has been done, for it is not the court's belief in the guilt of a defendant that matters, but the fairness of the procedures submitting the issue of guilt to the jury.

This equivocal and unjustified instruction of the trial court casts a shadow of a deep hue on any such sense of satisfaction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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ANNEX

STATEMENT*

In 1950, and for many years prior thereto, the Twin City Rapid Transit Company and its subsidiaries (herein called the "Transit Company") operated a street railway system in Minneapolis and St. Paul, Minnesota, and adjacent suburbs (V. 4, p. 103; V. 5, pp. 125-8).

In March, 1951, one Fred A. Ossanna was elected Chairman of the Board of the Transit Company, and in the fall of 1951 its President (V. 28, pp. 70, 75). Under the Ossanna administration the Transit Company converted to bus operation and in March, 1952, employed one Benson M. Larrick to conduct the conversion (V. 6, p. 123).

One Indictment (4-59-Cr. 77) in a series of Counts charged that Ossanna, Larrick and James A. Towey (an officer of the Transit Company not tried because of illness) and Isadore Blumenfield (a stockholder in the Transit Company, later acquitted by the jury) had conspired with petitioner Harry Isaacs and others in a single over all scheme to defraud the Transit Company in the disposition of street railway property which became surplus in the conversion to bus operation and in that connection had made use of the mails and interstate wire communications (V. 69, pp. 5-18).

The Indictment charged that, as "parts" of the single scheme, certain scrap was transferred to petitioner's Company, American Iron and Steel Corporation ("American Iron"), certain real estate and equipment were transferred to petitioner Harry H. Isaacs (which the trial court ruled was not fraudulent, V. 69, p. 95) and various other assets and commissions were transferred or paid to other parties (V. 69, pp. 8-15). A subsequent Count of this Indictment

*This statement is identical with that filed by co-petitioners Fred and Harry Isaacs.

(Count XVII) charged that all the defendants, including Earl Jeffords, a real estate broker, and other co-conspirators not named as defendants, had combined in the same scheme to defraud and to transfer the same assets as "parts" of the scheme (V. 69, p. 20).

The second Indictment (4-60-Cr. 13), consolidated with the first Indictment, charged petitioner Fred Isaacs and Theodore Landy (later acquitted by direction of the Court) with having become a party to the same single conspiracy charged in Count XVII of the first Indictment (V. 69, p. 5).

Certain intermediate Counts in the first Indictment charged Ossanna, Larrick, Towey, and petitioner Harry H. Isaacs with engaging in a scheme to accomplish the interstate shipments of certain scrap acquired by fraud by American Iron from the Transit Company (V. 69, pp. 18-20), which scrap the Government through its answer to a Motion for a Bill of Particulars claimed was the same scrap allegedly acquired in fulfillment of the same scheme to defraud (V. 43, p. 110).

At the trial, there was evidence of fraud in the transfer of scrap by the Transit Company to American Iron, and in the sale of real estate and payment of commissions to others, though none in the sale of real estate and equipment to petitioner Harry H. Isaacs. It also appeared that the scrap transactions were the largest in suit and overlapped the others in time. But there was no evidence that the scrap transactions depended on the conceiving or consummation of the other objectives for their success, or were connected in any way with the others, though all the transactions related to the disposition of surplus property and an officer or officers of the Transit Company necessarily participated in all.

The evidence, summarized in terms most favorable to the Government's contentions, can be stated as follows:

The Scrap Transactions: The Transit Company employed American Iron to remove track, trolley wire and other overhead appurtenances in exchange for the salvage removed, first under an exchange of letters between Ossanna and petitioner Harry H. Isaacs in July and August, 1951 (Ossanna Exhs. 2, 4, 5, V. 7, pp. 29, 31-4), and then under a formal written contract of February 11, 1952 (Exh. BZ, App. p. 101) and two Addenda thereto (App. pp. 106, 109). The letter agreement required American Iron to "repave wherever necessary" and the formal contract obligated it to "resurface * * * as required by all City Ordinances" of Minneapolis, as the Transit Company was obligated to do under its franchise (V. 6, p. 97; V. 21, pp. 43-4). In practice, American Iron was not required to repave at any time after the formal contract was executed; it had been required to do so on one street in 1951 (V. 20, p. 36; V. 50, pp. 115-16), but there was evidence that the Transit Company had borne the cost of that repaving (Exhs. I-M, I-N, V. 9, pp. 38-9). On October 30, 1953, the City of Minneapolis adopted an ordinance, accepted by the Transit Company on November 27, 1953, under which the Transit Company (and hence American Iron) was relieved of its franchise obligations to perform such removals and repaving, in consideration of $922,700.00 in cash payable over a ten-year period and the removal of so-called "special work" in paved intersections up to a cost of $300,000.00 (App. p. 87). American Iron did not contribute to the Transit Company's cost in cash or services and, so far as appears, was not asked to do so.

The potential cost of removing the rails and repaving in paved streets in Minneapolis substantially exceeded the salvage value of the track and overhead, possibly by as much as $1,000,000.00 (V. 7, p. 136; V. 21, pp. 100, 112; V. 26, p. 43; H. Isaacs Exh. 113, rec'd. V. 59, p. 25). The second

addendum to the removal contract, however, dated January 2, 1953, extended to American Iron in terms the right of "removal of underground cables" (App. p. 110), a provision which could reasonably be construed as extending to all such cables in the Transit Company system (V. 69, pp. 87-8), then of an estimated value of $1,000,000.00, less an estimated cost of removal of $50,000.00 (Exh. AG-2, V. 6, pp. 39-40). In practice, the cables were removed by the Transit Company's own forces and delivered to American Iron (V. 14, pp. 44-5; V. 15, p. 1). Petitioner Fred Isaacs reported to the Transit Company only some 20% of the weight actually received (Exh. JT, rec'd. V. 23, p. 121; Exh. K-1, rec'd. V. 22, p. 122; Exh. JX-4, rec'd. V. 24, p. 118), and American Iron paid for the weight so reported at prices substantially below the market value (V. 25, pp. 105-10), but in a total amount exceeding the estimated cost of removal of all the cable (H. Isaacs Exh. 114, V. 56, pp. 153-7, 179-80). If the second addendum were construed as giving American Iron the right to retain the cables for the service of removing them, as American Iron construed it (App. p. 16), but the Transit Company pulled them for its own purposes, instead of permitting American Iron to do so, American Iron was required to reimburse the Transit Company for the cost of removal, as the trial court agreed (V. 60, p. 106).

The removal contract of February 11, 1952 gave American Iron first option to purchase other, miscellaneous scrap at "ceiling price"; such prices were in effect from January, 1951 through February, 1953 under federal regulations (App. p. 105; V. 46, p. 56). In prior practice, the Transit Company had cleaned, sorted and prepared such scrap to the various specifications of steel mills and refineries, recorded it in inventory, and sold it on competitive bids at the Transit Company's own weights (V. 8, pp. 18-19,

141-2). The Transit Company delivered such scrap to American Iron without preparation, inventorying, or competitive bidding, and at American Iron's own weights and prices (V. 8, pp. 79, 89-91; V. 26, p. 77). Much of such scrap contained debris and some was worthless (V. 16, pp. 78, 105; V. 18, pp. 125-137). Petitioner Fred Isaacs furnished the Transit Company weight slips reporting 5% to 75% less that the gross weights of the scrap received (H. Isaacs Exhs. 111, 112, rec'd V. 56, pp. 20, 26; V. 16, pp. 25-30). These were forwarded to Larrick, in charge of the Transit Company's scrap program (V. 4, pp. 137-9), and he, in turn, sent American Iron the monthly totals for pricing and remittance (V. 22, pp. 132-140).

The Midcontinent Transaction: On December 22, 1953 the Transit Company contracted to sell petitioner Harry Isaacs, doing business as Midcontinent Construction and Development Company, certain real estate and machinery and equipment for $300,000.00, $100,000.00 in cash and $200,000.00 payable in one year (V. 31, pp. 46-50). All but one of the properties were certified by a qualified engineering firm approved by the Trustees for the company's bondholders, as having a value not in excess of the sale price (V. 32, pp. 105-18). On December 22, 1953, Harry Isaacs entered into a partnership agreement with one Robert Levitt, giving Levitt 52½% of the profits from development and sale of the properties so acquired, in exchange for his guaranteeing payment of the $200,000.00 (Exh. LZ, V. 31, pp. 57, 64-5). Levitt, in turn, took as subpartners his clients, the defendant Blumenfield and four business associates (V. 31, pp. 67-8), though this was not then known to Isaacs or Ossanna (V. 69, pp. 94-5).

The trial court ruled that the Midcontinent transaction was not fraudulent as a matter of law, and dismissed two related mail fraud counts, but permitted it to be considered

on the relationship of the parties (V. 61, p. 72; V. 69, p. 95).

Other transactions: There was evidence of fraud in other transactions tried in the same proceeding. Neither petitioner participated in any of them, or even knew any other defendant or alleged co-conspirator, except the Transit Company officers with whom they dealt in the scrap transactions.

(a) *Mexican Notes:* In 1955, the Transit Company discounted eight notes (V. 27, pp. 119, 170-1), acquired in part payment for streetcars sold in September, 1953 to a transit agency in Mexico City and guaranteed by Nacional Financiera, S.A., an agency of the Mexican Government (Exh. CP-2, V. 28, pp. 29, 33-5). From a total of $728,256.00 received, the Transit Company paid commissions of $238,349.73 to one George A. Francis, who was ostensibly engaged in the export-import business in Mexico City and named as a co-conspirator but not as a defendant (V. 30, pp. 109-10; Exh. BE-26, rec'd. V. 30, p. 88). Francis did not buy the notes (V. 27, pp. 119, 170-1; V. 29, pp. 39-40), and there was evidence that the then going rate of commission for brokerage services was ¼% to 1% of the face amount of the notes, or less than $10,000.00 (V. 30, p. 29). One payment to Francis was deposited in a Miami, Florida, bank, from which Francis withdrew $53,000.00 in cash (Exh. LP; V. 30, pp. 39, 45).

(b) *Hopkins right-of-way:* On May 6, 1955, on recommendation of Ossanna, the right-of-way formerly used for service to the Village of Hopkins, valued between $84,500 and $150,000 (V. 34, pp. 40-1, 133-40), and for two years unsuccessfully offered for highway purposes (V. 35, pp. 3-24), was sold for $10,000.00 to one W. N. Carlson, named as co-conspirator but not as a defendant (Exh. DD, V. 55, p. 107). Carlson shortly thereafter entered into an agreement with Ossanna's son and daughter to share, as he

claimed, the profits and losses fifty-fifty (V. 55, pp. 87-9). Carlson sold the real estate for $125,050 over a three year period (V. 36, pp. 64-66) and paid $52,000 to Ossanna Olson and daughter (V. 36, pp. 54-7; Exh. ND-1 rec'd. V. 36, p. 31). They in turn paid $30,000.00 to Ossanna personally and to an Ossanna family corporation, to repay an indebtedness to them. Ossanna claimed (V. 51, pp. 147-8, 158-9, 165).[2]

(c) *Jeffords Commission:* During the period July 6, 1954 through February 16, 1955, the Transit Company paid defendant Jeffords, doing business as J & C Holding Company, a total of $107,500.00 as purported commissions on the sale of three properties (V. 36, pp. 85-6; V. 37, p. 55; V. 38, pp. 114-15). There was evidence that Jeffords did not procure the purchases and had no valid listings (V. 36, pp. 72-83; V. 37, pp. 24-8, 136, 181-4; V. 38, pp. 107-15, 176). Jeffords withdrew substantial sums in cash as received (V. 39, pp. 83-6, 100, 102) and claimed that he lost $65,000.00 gambling in Florida (V. 38, pp. 53, 54).

(d) *The Towey Lots:* On March 1, 1954 Towey purchased two lots from the Transit Company in his uncle's name for $500.00 and resold them for $5,500.00 while masquerading as his uncle (V. 33, pp. 91-3, 172-3, 178-9).[3]

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[2] On May 23, 1955 Jeffords and his partner, one Marvin Benjamin, acquired an option from Carlson to purchase 800 feet which were in fact located on the Hopkins right-of-way, which agreement was on November 25, 1955 modified so as to release to Carlson 650 feet in consideration of $8,000.00 (Exh. XC-1, V. 35, pp. 55-7; Exh. NE-1, V. 35, pp. 57, 61). In July, 1955, Jeffords and his partner sold 150 feet for $12,000 (V. 35, pp. 64-5), with the result that, on all the transactions, they made a net profit of $14,000.00.

[3] On January 17, 1955, the Transit Company paid one Paul Villaume a reasonable $37,500.00 commission for services in procuring the sale of certain real estate (V. 37, pp. 190-1). Villaume thereupon made a donation of $7,500.00 to the Ossanna Foundation (V. 37, p. 193). The Government's theory, as stated by the Court below was that as a part of the scheme to defraud the Transit Company paid in the form of a commission $7,500.00 more than it was obligated to pay Villaume (App. p. 31).

Such, basically, was the evidence, viewed most favorably to the Government. Although no question is presented as to the sufficiency of the evidence of fraud in the scrap transactions, or any transaction in suit, separately considered, a further statement is required for a consideration of the second of the two questions presented on this petition, involving the Minneapolis Conversion Ordinance.

The Minneapolis Conversion Ordinance: The trial court permitted the jury to find fraud in the procurement and enactment of the Minneapolis Conversion Ordinance, of which the court below specifically found there was no evidence. That court however affirmed the convictions of petitioners on another theory, for which there was evidence.

The removal contracts, as the trial court instructed, required American Iron to perform or to be ready, willing and able to perform, all of its contract obligations, including the most onerous one, that of repaving in Minneapolis, as a condition of obtaining track and overhead or underground cable in exchange for the service of removal (V. 69, pp. 87-8). The Indictment charged that American Iron was fraudulently relieved of its contract repaving obligations as a "part" of the scheme to defraud (V. 69, p. 11), and this became a major issue at the trial (see, e.g. V. 20, pp. 16-120; V. 21, pp. 8-114, 180-99; V. 49, pp. 190-200; V. 50, pp. 3-123; V. 69, pp. 39-40, 88-9).

In particulars given in advance of trial, the Government claimed that the fraud occurred at the time, and because, of the enactment of the Minneapolis Conversion Ordinance of October 30, 1953 and its acceptance by the Transit Company, which action relieved American Iron, without any consideration, of its obligations to repave. This claim was stated by the Government as follows:

> "Mr. Janes: * * * the Transit Companies had, of course, the obligation to resurface. It was the Tran-

sit Companies' obligation to the City. After there had been some removal of rail and some lesser repaving, the Transit Companies acquired a release from the City of its entire obligation for a substantial consideration, and in so doing, at the Transit Companies' expense, achieved the release of American Iron and Supply Company's obligation to do some repaving, and released the Transit Companies' obligation in the future, and anybody else's that might arise, by contract or otherwise, throughout the City.

"The Court: Do you mean that the Transit Companies, for a consideration paid to the City, were released of their obligation to resurface certain stre , and American, in its contract with Transit, had agreed, as a part of the consideration for the salvage, to resurface those streets, and consequently, your position is that American received that benefit that enured to the Transit Companies without paying any consideration therefore?

"Mr. Janes: That is right."

* * *

"The Court: The remaining streets that had to be resurfaced by American, American was relieved therefrom by reason of Transit paying a consideration to the City of Minneapolis to be relieved of its initial [franchise] obligation, and therefore, a benefit was bestowed on American that it was not entitled to in view of its contract with Transit, and Transit illegally or unlawfully gave it a benefit to which it was not entitled?

"Mr. Janes: Right." (Transcript of Proceedings of October 16, 1959, pp. 133-5).

Alternatively, the Government on the same occasion claimed that the fraud may have occurred *before* the enactment of the ordinance, as follows:

> "Mr. Janes: * * * I would like to add to that, that we have evidence that American Iron had been relieved by the Transit Company of its paving obligations *prior* to the transaction with the City, between the Transit Company and the City relieving it of the obligation". (Id. p. 130; italics supplied.)

At the trial, the Government stated its first claim as follows:

> "The Court: The enactment of this ordinance to the extent that American * * * was (not) obliged to repave didn't enure to the benefit of American * * *. That was a perfectly okay transaction between the streetcar company and the City of Minneapolis relieving the Transit Company of repaving these streets, is that right?"
>
> "Mr. Janes: That is right.
>
> "The Court: Then your contention is that to the extent that American was obliged to repave and to the extent it was relieved of its obligation to repave, then the release obtained from the Transit Company was an incident here that you contend had some fraudulent aspects?
>
> "Mr. Hyam Segell: Yes, sir, third party beneficiary." (V. 21, pp. 186-7).

In stating its alternative claim at the trial, the Government asserted that the parties had "abandoned" the removal contracts (V. 49, p. 203), and added that the removal contracts were only a "paper matter placed in the files, rather than a contract between two parties at arm['s] length intending to carry it out" (V. 42, p. 130), and were drawn in that form "to hide what was going on" (V. 43, p. 25).

The minutes of the proceedings leading to the enactment of the conversion ordinance (V. 50, pp. 125-147;

V. 51, pp. 80-136) made it "crystal clear," as the court below concluded, that there was "no fraud", on the part of the representatives of the company in the "actual procurement or adoption of the ordinance" (App. p. 49).[4] There was uncontradicted evidence, moreover, that the Transit Company was released by the ordinance, not only of its obligation to repave the "surfaces" (which American Iron had assumed) but of its additional obligations to repave tie beds in poor condition and to clean and remove snow from streets along its routes (which American Iron had not assumed), with a resulting financial benefit to the Transit Company substantially in excess of the cost which it incurred under the ordinance (V. 21, pp. 45, 51, 55; Larrick Exh. 27, rec'd. V. 48, p. 44).

In charging the jury, however, the trial court failed and refused to give an instruction requested by petitioners that

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October 1953 was

[4]Faced with this evidence, the Government conceded in final rebuttal argument at the trial that the "conversion ordinance wasn't a part of any scheme" to defraud (V. 68, p. 65). The trial court nevertheless submitted to the jury the question of whether there was fraud in procuring the enactment of the ordinance, as hereafter set forth, and in the court below the Government claimed that its concession was in error and that there was in fact "fraud in the procurement of that ordinance." (Transcript of Oral Arguments of counsel, p. 128). The Government referred (id. pp. 128-30) to a letter from Harry Isaacs to Ossanna of July 28, 1953, which requested renegotiation of the removal contracts because of alleged excessive costs (Exh. HI-1 V. 9, pp. 55-7) and to the authority granted to Ossanna by the Transit Company on August 21, 1953, to renegotiate the contracts (V. 9, pp. 52-5), and claimed that, while there was no evidence that the contracts were ever renegotiated, there was evidence that American Iron's operations had in fact been profitable and that Ossanna's motive in negotiating the enactment of the conversion ordinance was to relieve American Iron of its repaying obligations. As stated, however, the court below concluded that there was no fraud in the actual procurement or adoption of the ordinance.

> procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company." (App. p. 46).

Instead, the court charged the jury that it was "the Government's position" that defendants schemed to relieve American Iron of its paving obligation "by the passage of the Ordinance" (App. p. 120), and instructed the jury to determine whether there was fraud in the passage of the Ordinance, as follows:

> "*What about the ordinance passed by the City of Minneapolis* to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? *Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract*, Government's Exhibit BZ?" (App. pp. 121-2, italics added).

The court separately submitted to the jury the alternative claim of the "Government" that "the parties never intended in good faith to go forward with the contracts according to their terms regarding the demolition of the system" (App. p. 121) as evidence by, among other things, "relieving of American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance * * *" (App. p. 121).

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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~1047~~ 187

FRED ISAACS and HARRY ISAACS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1048~~ 188

BENSON M. LARRICK

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1054~~ 194

FRED A. OSSANNA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1049~~ 189

EARL A. JEFFORDS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

JOINT APPENDIX

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

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APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,655

Fred Isaacs, Appellant,
vs.
United States of America, Appellee.

No. 16,656

Harry H. Isaacs, Appellant,
vs.
United States of America, Appellee.

No. 16,662

Fred A. Ossanna, Appellant,
vs.
United States of America, Appellee.

Appeals from the United States District Court for the District of Minnesota.

No. 16,663

Benson M. Larrick, Appellant,
vs.
United States of America, Appellee.

No. 16,669

Earl A. Jeffords, Appellant,
vs.
United States of America, Appellee.

[March 22, 1962.]

Before JOHNSEN, Chief Judge, and VAN OOSTERHOUT and MATHES, Circuit Judges.

MATHES, Circuit Judge.

Appellants Fred A. Ossanna, Benson M. Larrick and Harry H. Isaacs were found guilty by a jury of mail and wire fraud violations, transporting property fraudulently obtained in interstate commerce and of a conspiracy to commit offenses against the United States; appellants Fred Isaacs and Earl A. Jeffords were found guilty of a conspiracy. The trial took place in the United States District Court, District of Minnesota, Fourth Division, with the Honorable Gunnar H. Nordbye presiding. Judgments of convictions were entered on the jury's verdicts. Separate appeals have been taken but all appeals will be disposed of in one opinion.

Preliminarily, a brief resume of the background and the factual situation forming the genesis of the prosecution will be of assistance to a clearer understanding of the issues presented on appeal.

The Twin City Rapid Transit Company was the parent company of the following subsidiaries: Minneapolis Street Railway Company, the St. Paul City Railway Company, the Minneapolis and St. Paul Suburban Railroad Company, Twin City Motor Bus Company, the Minnetonka and White Bear Navigation Company, the Rapid Transit Real Estate Corporation, and the Transit Supply Company.[1]

The parent company was established in 1891, its stocks

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[1] The parties in the numerous briefs have generally referred to the parent company and its subsidiaries as either TCRT or Transit Companies. Since all are regarded for the purpose of these cases as one company, we shall, in the interest of brevity, unless otherwise designated, refer to the parent company and its subsidiaries as the Company.

and securities have been listed on the New York Stock Exchange since 1895, and its approximately 450,000 shares of common stock are held by approximately 3,000 shareholders situated throughout the United States and Canada.

Prior to January 1, 1950, the Company operated an electric street railway system over approximately 430 miles of street railway lines in the Twin City area of Minneapolis and St. Paul, Minnesota, and the suburbs thereof. The Company generated and distributed the electricity necessary in the operation of the system. It owned power plants where electricity was generated, electrically operated streetcars, an overhead system of cables, trolley wires and poles, the track system of steel rails, streetcar barns, real estate, and an underground transmission system, consisting of copper wires encased in lead cables laid in tunnels which generally followed street patterns throughout the Twin City area.

Before 1949 the Company's management was under the presidency of D. J. Strouse. One Charles Green, a substantial shareholder in the Company, was elected president of the Company in November, 1949. Fred A. Ossanna, one of the appellants herein, was then appointed general counsel of the Company.

Green's [illegible]ation as president was short-lived. Apparently because of procedures he employed strife developed among members of the board of directors, with Ossanna becoming the head of one faction and Green leading the other faction. Ossanna organized a stockholders' committee and conducted a proxy campaign which brought about the ouster of Green. He was replaced by Emil B. Aslesen, who served from March, 1951, to September, 1951, when Ossanna became president.

The Ossanna administration embarked upon a program of rapid conversion from streetcars to busses. This program caused a vast amount of property previously utilized in the operation of the street railway system to become surplus, and these prosecutions are based upon the procedures employed in the disposition of the surplus property or in connection with such disposition.

A brief statement of the occupation of the parties and their relationship, if any, to the Company should be made before other aspects of the trial proceedings are considered.

Fred A. Ossanna has been a lawyer since 1921 and prior to becoming associated with the Company, practiced his profession in Minnesota; at the time he organized the stockholders' committee in 1951, Ossanna was the direct and beneficial owner of 200 shares of the preferred stock and 11,500 shares of the common stock of the Company. He was president of the Company during the period of the alleged violations.

James H. Towey became a member of the board of directors with the advent of the Ossanna administration, and was secretary and treasurer of the Company during the period of the alleged violations. For a brief period of time he was in charge of the scrap program. He was a member of the Ossanna stockholders' committee organized for the proxy campaign and owned 170 shares of preferred and 5,700 shares of the common stock of the Company.

Benson M. Larrick with prior experience in the maintenance and operation of busses, was employed by the Company in 1952 and was placed in charge of the scrap resulting from the conversion. Larrick was made a director in 1954 and remained with the Company until 1957.

During this period he was general manager, vice-president and assistant to the president.

Isadore Blumenfield, although not a member of the stockholders' committee referred to, was the real owner of a substantial number of shares of stock of the Company. He was a friend and close business associate of Ossanna.

Harry H. Isaacs was president of American Iron & Supply Company (American Iron), which acquired the greater portion of the overhead and underground scrap and salvage from the Company, and is also a partner in American Salvage & Supply Company. (Other partners were Fred Isaacs and Theodore Landy). Harry Isaacs was also a partner in Mid-Continent Development and Construction Company which also acquired certain real estate and scrap from the Company. (There were five other partners including Isadore Blumenfield and his attorney, Robert Levitt).

Earl A. Jeffords was a realtor doing business as J & C Holding Company. He was the owner of 500 shares of the common stock of the Company at the time the stockholders' committee was organized and functioned, and was a member of that committee.

Fred Isaacs, the son of Harry H. Isaacs, was secretary of American Iron and partner in the American Salvage & Supply Company; he actively participated in the acquisition of the overhead and underground surplus scrap acquired from the Company.

In this setting we proceed to consideration of the indictments upon which appellants were tried, and other formal proceedings in the trial court.

The indictments are lengthy, but may be summarized as follows: Indictment No. 4-59-CR. 77, returned September

18, 1959, was in 17 counts, and named as defendants the appellants Ossanna, Larrick, Harry Isaacs, and Jeffords, and also James H. Towey and Isadore Blumenfield.[2] Within this indictment, four separate statutory offenses were charged, to wit: use of mails to execute a scheme to defraud (18 U.S.C.A. § 1341);[3] use of wire communication in furtherance of a scheme to defraud (18 U.S.C.A. § 1343);[4] transportation in interstate commerce of goods knowingly converted or taken by fraud (18 U.S.C.A. § 2314);[5] and conspiracy to commit an offense against the United States (18 U.S.C.A. § 371).[6] As may be seen, each of these offenses depends directly (or in the case of § 371, perhaps indirectly) upon the presence of a scheme to defraud. In Count I of this indictment, the scheme was described in detail—there it was alleged that all of the named defendants (save Jeffords) were participants in "a scheme and artifice to defraud (the Transit Company) and the

2 The date of docketing appeals of the respective appellants governs and accounts for the order in which appellants' names appear in the records of this Court.

3 "Whoever, having devised or intending to devise any scheme or artifice to defraud, * * *for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter * * *to be sent or delivered by the Post Office Department, * * *shall be fined * * *."

4 "Whoever, having devised, or intending to devise any scheme or artifice to defraud, * * *transmits or causes to be transmitted by means of wire, radio or television communication in interstate * * * commerce, any writings, * * * for the purpose of executing such scheme or artifice, shall be fined * * *."

5 "Whoever transports in interstate * * * commerce any goods, * * * of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud, * * *shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

6 "If two or more persons conspire to commit any offense against the United States, * * *and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 * * *."

stockholders . . . of real and personal property, and for obtaining for themselves and others not entitled thereto money and properties by means of false and fraudulent pretenses, representations, and promises.". For the purpose of later discussion, it is important to bear in mind that this *"overall scheme"* is the keynote and common thread running throughout the separate counts, and it is this scheme —"to loot the Transit Companies"—that serves to bind appellants together in guilt. After recital of the fraudulent scheme generally, as quoted above, Count I of the indictment then proceeded to recite some 17 transactions alleged to be "a part of said scheme and artifice." For the sake of brevity, these transactions have been characterized in trial and in the briefs under five headings: 1) fraud in dispositions of scrap and salvage; 2) fraud in sale of Mexican notes; 3) fraud in sale of the Hopkins Right-of-Way; 4) fraud as to commissions paid to defendant Jeffords; and 5) fraudulent transactions involving sale of lots to defendant Towey. It is important to note at this point that all of these transactions involved dispositions of Company assets.

This preliminary recital of the "overall scheme" and parts thereof, was realleged in each of the subsequent mail fraud and fraud by wire counts. Counts I through XIII were based upon the "mail fraud," or "wire fraud" statutes, each alleging mail or wire communications upon separate stated dates. Counts I through III covered the sending of incomplete and misleading annual reports on Company affairs (concealing transactions as to surplus salvage and scrap), and the defendants Ossanna, Larrick and Harry Isaacs were found guilty on these charges; Counts V and VI covered letters involving disposition of scrap and salvage, and defendants Ossanna, Larrick and Harry Isaacs were found guilty on these counts. Counts VII, VIII

and IX were directed to communications concerning the Mexican notes, and defendants Ossanna and Larrick were found guilty, and defendant Harry Isaacs, *not guilty* on these three counts. Counts XIV, XV and XVI also directed to transactions with scrap lead and cable, charged violations of 18 U.S.C.A. § 2314 (interstate transportation of fraudulently obtained property) through transportation on three separate dates of scrap and cable from Minnesota to points in Illinois and Nebraska, but it was not alleged these shipments were made as part of the overall scheme. The jury found defendants Ossanna, Larrick and Harry Isaacs guilty on these three counts.

Count XVII was the conspiracy count, whereby it was charged that the defendants Ossanna, Towey, Larrick, Blumenfield, Harry Isaacs and Jeffords, conspired together, and with one George A. Francis, one James B. Aune, and one Walter N. Carlson (not named as defendants), and others unknown, to commit offenses against the United States (18 U.S.C.A. § 371)—to wit: violations of the wire fraud, mail fraud, and interstate transportation of property statutes, as condemned in the preceding counts. A total of 39 overt acts were alleged which, generally speaking, covered the various transactions alleged in the substantive counts. The jury found defendants Ossanna, Larrick, Harry Isaacs and Jeffords guilty as charged under this count.

The defendant Towey, named as a defendant under the foregoing 17 counts, was not tried with the other defendants due to illness. The trial court directed a judgment of acquittal as to defendant Blumenfield on Counts XIV, XV and XVI (transportation of scrap), and the jury found defendant Blumenfield not guilty on all of the remaining counts tried. The jury also found defendants Ossanna,

Larrick and Harry Isaacs not guilty as to Count XII, which involved commissions paid to a certain Paul Villaume.[7]

The appellant Fred Isaacs is before us by reason of his conviction under a second indictment, being No. 4-60-CR. 13. There, Fred Isaacs, and one Theodore Landy were named as defendants, charged with violation of the conspiracy section (18 U.S.C.A. § 371). Generally speaking, this indictment was identical with Count XVII of Indictment No. 77, with some additional overt acts alleged, particularly with regard to alteration of weight tickets. The trial court directed a judgment of acquittal as to the defendant Landy, and the jury found defendant Fred Isaacs guilty as charged.[8]

After meticulous consideration by the trial court of every contention and claim of error asserted, appellants' after trial motions for judgments of acquittal, or in the alternative, for new trials, were denied. Ossanna was given a general sentence of four years, and a committed fine of $1,000 on his convictions under Counts I, II, III, V, VI, VII, VIII and IX, and an additional four years, to be served concurrently, and a committed fine of $10,000, covering his convictions on Counts XIV, XV, XVI and XVII. Harry Isaacs was given a general sentence of four years and a committed fine of $1,000 on his convictions under Counts I, II, III, V and VI, and an additional general sentence of four years, to be served concurrently, and a committed fine of $10,000 upon his convictions under Counts XIV, XV, XVI and XVII. Appellant Larrick was

7 The trial court dismissed Counts IV, X, XI and XIII of Indictment No. 4-59-CR. 77 prior to submission to the jury.

8 A third indictment, being No. 4-59-CR. 78, was dismissed by the court pursuant to motions of defendants.

given a general sentence of two years and a committed fine of $1,000 under Counts I, II, III, V, VI, VII, VIII and IX, and a general sentence of two years, to be served concurrently, and a committed fine of $2,000 on the remaining counts. Jeffords received a sentence of 18 months and a committed fine of $1,500, and Fred Isaacs was sentenced for a period of one year and one day, and given a committed fine of $2,500. Additionally, appellants Ossanna and Harry Isaacs were each ordered to pay one-half of the costs of prosecution.

Common to all of the appellants is the broad contention properly preserved and protected by the record, that, as a matter of law, the evidence was insufficient to sustain the verdicts and the judgments entered thereon. It should be pointed out, however, that no question is raised or presented as to the sufficiency of the evidence to establish that the mails and wire were used for the purpose of executing the scheme to defraud. The sufficiency of evidence contention is focused upon two key issues: one, whether there was *fraud practiced* in the disposition of the Company's property to its loss and detriment; and two, was such fraud the result of a single, overall scheme and plan as contended by the Government, or were there a number of independent, isolated and unrelated schemes to defraud as urged by the appellants. The contention of the appellants requires a rather detailed review of the evidence; however, such review will be in the light most favorable to the Government because our chief concern is not whether there was evidence from which the jury could have acquitted the appellants but whether there was substantial evidence to sustain the jury's finding of fraud and the existence of an overall scheme to defraud as alleged in the indictments. Of course, as was pointed out by the trial court, if each

appellant was privately engaged in his own bit of fraud and there was no common scheme, then appellants would prevail, for the convictions depended upon proof of joint action and a common purpose.

The scope, magnitude and extent of our task may be appreciated in light of the fact that the trial commenced on April 18, 1960, and proceeded without undue interruption to August 6, 1960, when verdicts were returned; that 150 witnesses testified; that the exhibits are many and voluminous and that 72 volumes of transcript of more than 11,000 pages have been filed as the record;[9] that the court's charge, following extensive argument by counsel for defendants[10] was so comprehensive and exhaustive that the entire day of August 1, 1960 (from 9:30 a. m. to 5:30 p. m.) was required and consumed in delivering the same, and that the jury deliberated without interruption until August 6, 1960, when the verdicts were returned.[11] Interestingly enough, the principal dispute between the Government and appellants stems not from a disagreement as to the pertinent facts and circumstances, but rather from the conclusions and interpretations to be drawn therefrom.

Preliminarily we recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult, if not impossible, to formulate an exact, definite and all-inclusive definition thereof; and that each case must be determined on its own facts. In general,

9 Although numerous witnesses and exhibits were offered on behalf of defendants, none of them personally testified.

10 Harry and Fred Isaacs were represented by the same counsel, and each of the remaining defendants was represented by counsel of his own selection.

11 Pursuant to our Rule 8(i) we have reviewed this case upon the original papers and the typewritten transcript of the evidence and proceedings at trial.

and in its generic sense, fraud comprises all acts, conduct, omissions and concealment involving breach of a legal or equitable duty and resulting in damage to another. 37 C.J.S. Fraud § 1. For various definitions of fraud found in pronouncements by the courts, see 23 Am. Jur. Fraud and Deceit, § 2.

SCRAP TRANSACTIONS

A large portion of the trial was consumed in developing the methods and procedures adopted in the disposition of scrap property, having a very substantial value. This property has been placed in several categories referred to as "track and overhead scrap," "miscellaneous scrap" and "underground cable." Shortly after the Ossanna group assumed control of the Company, Towey was placed in charge of the sale of scrap. He was relieved of this responsibility and was replaced by Larrick, when the latter was employed by the Company, and thereafter the bulk of the scrap transactions was under the control and domination of Ossanna and Larrick as representatives of the Company, and Harry Isaacs and Fred Isaacs on behalf of American Iron, the recipient of the major portion of the scrap.

We have reviewed the entire record with painstaking care and have no difficulty in reaching the conclusion that there was substantial evidence from which the jury could find that the course pursued in disposing of the scrap was permeated with fraud. Indeed, counsel for the Isaacses, with commendable frankness, stated in oral argument before this Court: "[A]nd may I say preliminarily, speaking for the appellants that I represent, Fred Isaacs and Harry Isaacs, we raise no question as to the sufficiency of the evidence to sustain a finding of fraud as to the separate

transaction in which they engaged, the scrap transaction, senting the Company because of the loose method of haner than alleged as a part of a single overall scheme or conspiracy."[12]

There were numerous devices and devious methods employed to effectuate the fraudulent scrap transactions over the period beginning in mid 1951 and extending to August, 1955.[13] For the present, a summary thereof will suffice:

(a) At the direction of Ossanna and Larrick, adequate records and strict accounting procedures relating to the scrap accumulated and sold were discarded. The Company's auditors disapproved the procedures inaugurated by Ossanna and Larrick but with no avail, and ceased representing the Company because of the loose method of handling and disposing of the scrap.[14]

---

12 In Larrick's brief this statement appears: "Larrick does not now raise the question of whether or not there would be sufficient evidence to warrant submission of the scrap transactions as against him, if done so under proper circumstances. It is with respect to the other transactions that the evidence is insufficient to warrant submission as against him."

---

13 In October and November, 1957, scrap was disposed of for which the Company received $487.34, but for all practical purposes the scrap transactions ceased in September, 1955.

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14 Under date of February 27, 1952, the auditors in a letter to Ossanna as president, stated inter alia:

> "A second and possibly stronger objection to the proposed method is that it would mean the complete abandonment of accounting control of scrap between the time that it is accumulated and the time it is sold. The value of scrap in inventory has been relatively large at some times during the course of the years; certainly one would not consider abandonment of accounting control over a similar amount of cash. This accounting control has two practical applications. In the absence of accounting control, the responsible officers have little basis for assuring themselves that proper amounts are received for sales of scrap. Also, the absence of accounting control may well lead to absence of physical control. * * *The proposed method exposes the companies to greater danger of loss through stealing."

In a letter under date of November 10, 1952, the auditors advised Ossanna that because of the weaknesses in the accounting records of the Company, they were unable to satisfy themselves as to the correctness of the financial statements and did not wish to continue as auditors.

(b) After American Iron began acquiring overhead scrap from the Company, Ossanna and Larrick issued directions to subordinates to discontinue effective control of the scrap disposed of. Thus, in September, 1952, Larrick instructed Walter Larson, purchasing agent of the Company, "From here on out, I don't want you to keep track of any scrap at all. Forget about it. Don't weigh it. Don't keep track of the trucks that come in to haul it away or attempt to price it. Just forget about it. We will take care of that up at the office, 11th Street."

(c) The removal by American Iron of scrap was initiated pursuant to a letter agreement consummated in August, 1951, under which American Iron agreed to "take up all rail, scrap, overhead lines and poles of abandoned streetcar lines without cost to Company, their compensation being the salvage value of the material taken up. They also agree, in taking up the rail, to back-fill to the street level and to repave wherever necessary." At the insistence of the auditors, a contract was entered into under date of February 11, 1952, providing that American Iron should remove tracks, overhead wires, poles, ties and other appurtenances along certain streets in Minneapolis; agreeing further to resurface and restore all portions of roadways and streets as required by city ordinances. As full compensation American Iron was to receive and retain all materials removed by it. It is undisputed, however, that steel rails were removed by American Iron from only one abandoned street and although it repaved this street, there was evidence from which the jury could find that the repaving costs were paid by the Company. The bulk of the rails removed by American Iron was from dirt streets where costly repaving was not required.

On August 13, 1952, an addendum was made to the original contract, including seven lines in St. Paul which were to be removed by American Iron. This addendum further provided that American Iron did not have the obligation to repave any of these streets.

(d) The authority of the Company to use the streets of Minneapolis for operation of its street railway system was derived from a franchise granted by the city. Thereunder the Company was obligated to pave, maintain, repair and improve that portion of the streets between the rails. During the progress of converting, the Company applied to the city for permission to discontinue the operation of streetcars on certain streets. Such discontinuance necessitated the removal of tracks, switches and other apparatus, and the repaving of many streets. After negotiations, and on October 30, 1953, the so-called conversion ordinance was adopted (in reality an agreement between the city and the Company) and which provided in part that the city would perform a substantial portion of the work incident to the removal of Company property from the streets, including the paving, repaving and resurfacing of streets over the rails and right-of-way where necessary. In consideration therefor, the Company obligated itself to pay to the city $10,000 per street mile, or a total of $922,790. Additionally, the Company was required to expend an amount not to exceed $300,000 for what is referred to as special work, and which involved in the main the removing of switches, mates, frogs, and other property from the streets. Under the contract of February 11, 1952, with American Iron, the latter was required to do and perform the work which was the subject of the conversion ordinance, and which required the expenditure on the part of the Company of more than $1,200,000. However, startling as it may seem, no ef-

fort was made by Ossanna or anyone on behalf of the Company to adjust the contract with American Iron or recover from it any part of the amount paid by the Company to the city. The conversion ordinance is just another circumstance which gives force to the Government's position, sustained by the jury, that the contract under which American Iron was purportedly operating was accorded lip service only and that even before the conversion ordinance, the Isaacses, with the approval of Ossanna and Larrick, were doing an effective job of defrauding the Company of property in substantial portions.

(e) Under date of July 30, 1952, Lynn G. Barnes, then vice-president and general manager of the Company, advised Ossanna that the value of the underground scrap, consisting in the main of copper wire encased in lead cables, was in excess of $1,000,000 and could be removed at a cost of approximately $50,000.[15] A suggestion from Barnes that the Company remove and sell the cable was ignored by Ossanna who, on January 2, 1953, entered into a second addendum to the February 11, 1952 contract with American Iron. This addendum was interpreted by American Iron as conferring upon it the absolute right to receive and retain all underground cable in consideration for its services in removing the same. It stands undisputed, however, that none of the cable was removed by American Iron. Instead, employees of the Company performed this operation and placed the cable in appropriate lengths on the streets, where it was picked up by American Iron. The scrap was weighed on scales of American Iron and false weight tickets were prepared by its employees at the in-

15 Barnes resigned from the Company shortly after that date and in September, 1952, became vice-president and general manager of Omaha Transit Company and has been president of that Company since 1955.

stance and direction of Fred Isaacs or Landy.[16] Contrary to instructions from Larrick, employees of the Company who participated in the removal of the underground cable made and retained records disclosing the amount of cable actually removed and delivered to American Iron. This information was furnished to Government agents, who were able therefrom to calculate the total amount of cable in pounds that had been removed and to demonstrate the difference between the value of cable actually acquired by American Iron and the amount paid by the latter to the Company, based upon the false and fictitious weights. From exhibits prepared by the Government agents, it appears that whereas the estimated market value of cable received by American Iron was approximately $938,000, the Company received only $123,000.

In an effort to offset the overwhelming evidence of fraud found in the falsification of the weight tickets, appellants took the position in the trial court that American Iron did not purchase the underground cable; that under the contract (second addendum) it was entitled to the cable for its labor and expense incident to removal thereof, and that the amount paid to the Company represented an adjustment of labor costs. We agree with Judge Nordbye's conclusion, expressed in his opinion denying after-trial motions, that this "contention * * * is simply incredible in view of the conduct of the parties."

16 After American Iron employees had prepared the weight tickets they were changed and falsified by erasing the original weights and inserting lower weights (on an average these lower weights were 20% of the actual weights). In some cases the original tickets were discarded and new false weight tickets prepared. These false weight tickets were then sent to Larrick, who prepared invoices without prices, which were sent to American Iron, who inserted the prices and calculated the amount it would pay the Company.

This transaction, found by the jury to be a part of the scheme and artifice to defraud, culminated in the Company paying $238,349.73 to one George A. Francis.

James A. Quint, engaged in the business of exporting, importing and advertising, was authorized by Larrick to sell streetcars of the Company rendered surplus by the conversion program. Negotiations led to a sale of 91 P.C.C. streetcars to Servicio de Transportes Electricoes, the transit system in Mexico City, Mexico. The sales contract, dated September 4, 1953, provided for a cash payment of $327,541.68, or 20% of the sales price, and payment of the balance of $910,320 in 10 equal semi-annual installments, as evidenced by 10 promissory notes in the amount of $91,032 each, maturing as follows: the first on June 1, 1954 and one each 6 months thereafter, the last becoming due December 1, 1958. While the contract was dated September 4, 1953, the notes were dated December 1, 1953 and bore interest from that date at 4% per annum. There was a further contractual provision that purchaser had the right to take up the first two notes maturing June 1, 1954, and December 1, 1954, at a discount of 9% upon delivery of the cars to purchaser. The notes were guaranteed by Nacional Financiera S. A., a Mexican agency, stated by a banker witness to be a "Mexican Government entity that covers the financing of the purchases by various Mexican Government agencies—practically everything Mexico buys is guaranteed by the Nacional Financiera." Another banker witness likened the agency to the "equivalent of the Reconstruction Finance Corporation of the United States."

Prior to the consummation of the sale of the streetcars,

Ossanna had informed the executive committee of the Company that "the outstanding feature of this deal is that the cars were sold on a contract basis, running for four years, payment being guaranteed by the Bank of Mexico and the Transportes Bank of Mexico." And at the annual meeting of the shareholders of the Company on March 8, 1954, in reporting the sale of the streetcars, Ossanna stated: "We sold them on time and after considerable negotiation, the Bank of Mexico, which is the same as our Federal Reserve Bank in this country, guaranteed payment, and we think we are perfectly safe and we were paid a portion of the amount [of] each car as shipped; the last one was shipped last Friday."

Other evidence discloses that the solvency and soundness of Nacional Financiera had been brought home to Ossanna and Larrick. Thus, in August, 1954, Larrick had obtained information from the Hanover Bank in New York indicating that that institution had extended a line of credit to Nacional Financiera of ten to twelve million dollars; information had been furnished by the foreign department of Northwestern National Bank of Minneapolis attesting to the soundness of the notes; and in accordance with the contract for sale, the Company, on June 11, 1954, received $88,026.06 for each of the first two notes maturing on June 1 and September 1, 1954, representing the face amount thereof, less the 9% discount.

Other parties demonstrated considerable interest in disposing of the notes, although how they acquired knowledge of the Company's position in that regard is not made clear. In the fall of 1953, which was before the issuance of the notes, Harry Bloom, brother of defendant Blumenfield, is found on the scene discussing with one Salk, a Chi-

cago mortgage banker, possible sale of the notes at a discount. Salk desired more information, and in April, 1954, was advised by Larrick that the notes were sound as an investment. Nothing of concrete form was done by Salk toward purchase of the notes, although Bloom endeavored as late as August, 1954, to persuade Salk to purchase these assets.

On October 6, 1954, Robert Levitt, who had been Blumenfield's attorney for many years, advised Ossanna that he was interested in securing an option to buy the notes at a discount of 40% for out-of-town principals whom he represented. (Two of these principals were Blumenfield and Bloom—others were not named). The option was granted by Ossanna on October 11, 1954, and remained in force until November 1, 1954, when Levitt advised Ossanna that the option was being dropped as it involved too much risk. Levitt testified that he surrendered the option because Northwestern National Bank of Minneapolis had informed him that it was not familiar with Nacional Financiera, guarantor of the notes. However, the Government offered evidence establishing that as early as March, 1954, Levitt had been informed by Northwestern Bank that Nacional Financiera met its obligations "with very satisfactory punctuality."

Blumenfield re-entered the picture in February, 1955, when he took Ossanna to Miami, Florida, to meet with one Sam Kay. The latter offered to buy the notes at a 40% discount. Ossanna assisted in the preparation of the offer which was accompanied by Kay's check for $50,000. This offer was of short duration. On March 14, 1955, Ossanna returned Kay's check and informed him that a prior option held by another party had been exercised. Apparently this reference was to George A. Francis.

It appears that Francis made his entry into the picture in November 1954, and shortly after Levitt had dropped his option. Having received two offers to purchase the notes at a discount of 40% (both coming directly or indirectly from Blumenfeld or his associates), Ossanna informed the board of directors of the Company on November 16, 1954, that there were firms in New York and Chicago that would not take the notes at this discount, and stated: "The danger to us, as in Brazil, is that Mexico can have a change of Government over night and their word wouldn't be worth a nickel." During the same meeting the board adopted a motion offered by Ossanna that "we put through our bank for collection and payment in American dollars the eight notes of Servicio de Transportes Electricoes for purchase by George Francis, of Mexico City, Mexico, at 40% discount, as offered by him * * *." On the same day Ossanna wrote Francis that the board had accepted his offer to purchase the notes at a 40% discount. However, there was no evidence showing when or where Francis made such an offer. The Government did introduce a letter purportedly written by George A. Francis to "Secretary to the Office of President of the Republic" under date of October 7, 1954, in which he stated that "the holders of * ** * promissory notes want the Nacional Financiera, S.A. to discount them and in this case, the latter institution will receive the 4% interest designated in favor of the beneficiary. * * *."[17]

On March 16, 1955, the board of directors of Minneapolis Street Railway Company adopted a resolution providing that "this corporation sell to the Hanover Bank, without recourse, all the rights, title, * * * in and to the

17 The effect of this offer is not made clear to us from other portions of the letter or record.

above described notes and joins with the St. Paul City Railway Company in selling and discounting said notes to the Hanover Bank for a total price equal to 92% of face value, plus 100% of unpaid and accrued interest."[18] On April 8, 1955, the four first maturing notes were sent to Northwestern National Bank with instructions to forward them to Hanover Bank for discounting at 92% of face value. These instructions were carried out. Hanover Bank paid $351,079.25 for these notes and credited this amount to Northwestern National Bank for the benefit of the Company. The Hanover Bank held the notes until their maturity dates, when they were paid in full.

On April 15, 1955, Ossanna sent [a] check to Lewis & McDonald, attorneys of New York, for $5,000, representing their brokerage fee for handling sale of the four notes. On the same day two certified checks were issued payable to George Francis, one in the sum of $15,000, the other for $96,438.24. These checks were authorized by either Ossanna or Larrick, or both, and a notation appeared thereon that they were in payment of commission on sale of the notes.

The remaining four notes were handled differently. On July 26, 1955, they were sent by Ossanna to Northwestern National Bank with instructions to forward them to Banco de Commercio in Mexico City for delivery to Nacional Financiera upon payment by the latter of the sum equal to 87% of the face value, plus 4% accrued interest thereon. Apparently there was a change in instructions to the Northwestern National Bank as we find it later directed Banco de Commercio to pay to George Francis out of the

18 As previously stated, these corporations are subsidiaries of the parent company. Apparently they owned the streetcars and the notes ran in their favor.

proceeds of collection, an amount not to exceed $61,500. This was done, and on August 6, 1955, Northwestern National Bank received a draft in the amount of $323,585.59 representing the face amount of the notes, plus interest, less $61,500 paid to Francis.[19]

On August 10, 1955, a Company check in the amount of $83,316.31 was drawn to the order of George Francis, with requisition attached thereto as follows: "Deliver the following to, mail to George Francis, c/o Jose Leal, 605 S. W. 9th Avenue, Miami, Florida," and bore the approval of Ossanna and Larrick, and stated that it was in full of "any and all commissions and/or discount." On September 23, 1955, another check in the sum of $834.89 was drawn in favor of George A. Francis, covering "balance commission sale of last four notes * * *." Thus out of the proceeds of the sale of the eight notes, George Francis received $238,349.73.

Although a subpoena had been issued for George A. Francis, he did not appear and, of course, did not testify. The Government was able, however, to prove that on August 18, 1955, a bank account was opened in the name of George A. Francis in a bank in Miami, the deposit being $83,316.31, and that on August 24, 1955, $53,000 in cash was withdrawn from that account.

In the face of the foregoing facts and circumstances, appellants, and particularly Ossanna and Larrick, advance the argument that the only conclusion that can be drawn

19 The covering letter from Banco de Commercio to Northwestern National Bank referred to a receipt from Francis, which actually was in the form of a letter purportedly written by Francis to Banco de Commercio, stating, inter alia: "In accordance with the instructions of the mentioned Bank (Northwestern National) have gave to me from your collection the amount of $61,500 U.S. * * *." The letter states further that "Amount for liquidation of the interests of the Financiera S.A." was $18,739.71, thus indicating that Francis' net was $42,760.29.

by reasonable men is that the course of conduct pursued in the disposition of the notes is invulnerable to a successful charge of fraud; that what was done was legal, proper and legitimate. We are not at all impressed with the urgency of this contention. While a casual and superficial consideration of the various attending circumstances may indicate some basis for the claim of legitimate fair dealing, when the searchlight of truth is focused on the transaction from beginning to end and the numerous ramifications thereof, we have no difficulty in finding a factual basis for the conclusion, obviously reached by the jury and shared in by the trial court, that a substantial amount of the Company's property was diverted from it and obtained by others not entitled thereto by fraudulent means. From our summary, it is made to appear that even before the notes were executed certain defendants and their close associates were maneuvering to dispose of them for a greatly reduced price. Later Ossanna granted two options, one to the attorney for Blumenfield, the other to Blumenfield's associate, for disposition of these assets at 60% of their face value. This was done notwithstanding Ossanna had vouched for the soundness of the notes on at least two prior occasions. While neither of the options was exercised, it is quite apparent that Ossanna utilized both offers very effectively by prevailing on the board of directors to authorize a sale of the notes to George A. Francis at a discount of 40%. The final chapter of this bizarre story is that although the board of directors authorized the sale of the notes to Francis, he did not in fact buy any of them. Neither is the evidence at all sufficient to satisfy reasonable men that Francis rendered any services beneficial to the Company in the disposition of the notes.

HOPKINS-RIGHT-OF-WAY

In 1951 the Company abandoned the streetcar line that ran from the city limits of Minneapolis (France Avenue) to Central Avenue in the City of Hopkins, Minnesota, leaving for disposal the right-of-way, the overall length of which was 3.6 miles. For a distance of 1.25 miles this strip of land was 66 feet wide and the remainder was 100 feet wide. Record title was held by Minneapolis and St. Paul Suburban Railroad Company, one of the subsidiaries of the parent company. It was the Government's position, and the indictment alleged, that "It was a part of said scheme and artifice that properties of the Transit Companies, including part of that known as the Hopkins Right-of-Way * * * would be transferred by the Transit Companies for a grossly inadequate consideration and to and through one Walter N. Carlson and for his benefit and the benefit of the defendant's associates and of their nominees, including Fred Ossanna, Jr. and Mrs. M. A. Stirton, a daughter of defendant Fred A. Ossanna, and of Shady Oaks Realty Co., and of others to the grand jury unknown."

The following facts with respect to this property were developed by the evidence. At the request of appellant Ossanna, one Brancheau, an experienced real estate dealer and appraiser in Minneapolis, submitted an appraisal on September 1, 1951, which divided the right-of-way into four sections, aggregating $84,500.[20] Additionally several members of the Minneapolis Real Estate Board made an appraisal of the portion of the right-of-way from Brookside

20 A small section extending about a block at the city limits of Minneapolis, having commercial value, was appraised at $9,000; the portion of the strip which extended 1.25 miles, being 66 feet wide, was appraised at $15,500; the portion that extended from Woodale Avenue to Brookside Station, being 100 feet wide, was appraised at $23,000, and the remainder at $37,000.

Station to Central Avenue, and fixed the value at $40,550. (This same section had been appraised by Brancheau at $37,000). It was also made to appear that shortly after this property became surplus the Company determined the value of the entire strip for selling purposes to be approximately $98,000.[21]

The municipalities and political subdivisions (hereinafter referred to as municipalities), some six in number, through which the right-of-way ran, formed a committee for the purpose of purchasing the same for use as a thoroughfare into Minneapolis. This committee functioned through or in conjunction with the Board of Hennepin County Commissioners (Board). Under date of May 15, 1952, the Board by letter directed to the attention of Ossanna, offered to pay $56,500 for the entire right-of-way. A meeting between representatives of the interested municipalities and representatives of the Company, the latter including Ossanna, was held on May 19, 1952, during which "Mr. Ossanna informed the committee that he could not recommend to the board of directors of this Company the sale of the right-of-way at such a low figure" [$56,500]. Thereafter, on July 1, 1952, the Board made a written offer to purchase that part of the right-of-way from Brookside Station to a point in Hopkins for $75,000.[22] By letter of July 7, 1952, Ossanna accepted this offer, in which he also stated: "Our previously stated offer to sell this right-of-way, as contained in our letter dated April 22, 1952, at a price of $98,500 was, in our considered opin-

21 Daniel J. Bren, who was assistant to the president in 1951, testified: "We established a price on the right-of-way from France Avenue to Hopkins of approximately $98,000."

22 From plats of the right-of-way it would appear that this portion constituted more than half of the entire strip.

ion, a very low price * * *." Thereafter, on October 15, 1952, a contract was entered into between the record title holder of a portion of the property involved and the City of Hopkins, which granted the city an option to purchase the same for $75,000.[23] This option was renewed from time to time until the summer of 1953. On July 9, 1953, in a letter directed to "Chairman Right-of-Way Purchase Committee" Ossanna offered to sell the remainder of the right-of-way (France Avenue to Brookside Station) for "cash consideration of $75,000." This latter offer was not accepted, the Hopkins option was never exercised, and negotiations with the municipalities ceased in September, 1953.[24]

Apparently no further action was taken with regard to disposition of this property until September 13, 1954, when the board of directors of the Company authorized Ossanna and Towey to effect the sale of the right-of-way "on the best possible basis before taxes became due." The next event of consequence occurred on May 6, 1955, when at a special meeting of the board of directors Ossanna reported that the "Hopkins right-of-way had been agreed to be sold to W. N. Carlson for the sum of $10,000, we to pay the back taxes and give proper deed." On the same date a deed conveying the property was executed by Towey and Ossanna.

The record discloses that shortly after Carlson acquired the property, appellant Jeffords entered upon the scene. He acquired an option to purchase a small portion of the

23 Although all prior dealings for purchase of the property had been on behalf of the six municipalities, it will be noted that the option was only with the City of Hopkins.

24 Thus we see that Ossanna had placed a value of $150,000 on the entire right-of-way.

right-of-way from Carlson for $6,000 and paid $3,000 with the execution of the option contract. On November 25, 1955, the option contract was modified whereby Jeffords released a portion of the property under option in consideration of the payment to him of $8,000. (This was accomplished by the forgiveness of $3,000 under the original option and a payment of $5,000 over and above that). The net result of the modification was that Jeffords acquired a lot and $2,000 in cash from Carlson. Jeffords later sold the property for $12,000, thus realizing a profit on the whole transaction of $14,000.

Shortly after Carlson acquired the property he entered into an agreement with Fred Ossanna, Jr. and Margaret Stirton, son and daughter of appellant Ossanna, under which they were to share "fifty-fifty" in the profits derived from the sale of the real estate. Thereafter and through the efforts of a real estate company, and during the years 1955, 1956 and 1957, Carlson sold the remainder of the Hopkins right-of-way for a total of $126,075.56.[25] Carlson paid to Fred A. Ossanna, Jr. and Margaret Stirton, the following amounts:

Date	Name	Amount
April 25, 1956	Fred A. Ossanna, Jr.	$15,000.00
April 25, 1956	M. A. Stirton	15,000.00
December 19, 1956	M. A. Stirton	5,000.00
December 19, 1956	Fred A. Ossanna, Jr.	5,000.00
July 16, 1957	M. A. Stirton	6,000.00
July 16, 1957	Fred A. Ossanna, Jr.	6,000.00
	Total	$52,000.00

The $15,000 check to Fred A. Ossanna, Jr. was endorsed

25 Apparently the net amount realized by Carlson, after deducting expenses incident to sales, was $90,533.92.

payable to an Ossanna owned Company, and the $15,000 check to Margaret Stirton was endorsed payable to appellant Ossanna.[26]

It should also be stated that appellant Ossanna was active in negotiations carried on for sale of the property after it was acquired by Carlson. The latter informed the realtor who was handling the sales that Ossanna was Carlson's counsel, and the realtor was directed to consult with Ossanna when Carlson was not available. Copies of correspondence from the realtor to Carlson were sent to Ossanna.

From the foregoing chain of circumstances established by undisputed evidence, we have no difficulty in concluding that there was substantial evidence to support a finding that the transaction was motivated by fraud and not as a result of an honest desire to protect the interests of the Company. As was true with regard to disposition of the Mexican notes, there were negotiations which facially indicated legitimacy but when the ultimate result is considered, the shell of fair dealing is pierced, and the true intent and purpose of the main participants is revealed. There simply is no logical explanation for disposition of property appraised at $84,500, valued by Ossanna at $98,500 and $150,000, being sold for $10,000, so that the purchaser was enabled to reap a profit of nearly one thousand per cent, and one of the appellants, who unquestionably dominated and controlled the entire situation insofar as the Company was concerned, being the recipient directly or indirectly of $52,000.

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26 Evidence was offered by appellants to show that the sum of $52,000 was paid to reduce indebtedness of Fred A. Ossanna, Jr. to Shady Oaks Realty Company, a corporation owned by the Ossanna family, and indebtedness of Margaret A. Stirton to appellant Ossanna.

JEFFORDS' COMMISSIONS

This facet of the scheme involves the sum of $107,500 paid to appellant Earl A. Jeffords, who was a licensed real estate broker, doing business as J & C Holding Company. As we shall presently see, four checks totaling that sum were issued in payment of commissions purportedly due Jeffords in connection with the sale of three different parcels of real estate which had become surplus property. The controverted issue resolved in favor of the Government is whether Jeffords was legally entitled to the commissions as urged by him, or whether, as contended by the Government, the payments were wholly without consideration and constituted a part of the scheme and artifice to defraud the Company.

On July 6, 1954, a requisition signed by Larrick and Ossanna, initialed by Towey, directed the issuance of the Company's check to Jeffords in the sum of $12,500 "covering commission on power plant in excess of $1,250,000." Jeffords asserted that he was the procuring cause for sale of the power plant to Northern States Power Co. and consequently was entitled to the commission. The Government's position was exactly to the contrary. Our review and analysis of the record convinces that there was substantial evidence to support the Government's position. Indeed, the official minutes of the Company plainly established that Ossanna was given credit for disposing of the property through his sole efforts.[27]

The Company's Currie Avenue property was sold to the City of Minneapolis in November, 1954, for $200,000. On the day before the sale was authorized by formal action of

27 In an interview with two agents of the Internal Revenue Service, Ossanna stated that he had personally sold the power plant to the Northern States Power Co. for $1,250,000.

the board of directors, Jeffords made a demand for $20,000 commission in accordance with an exclusive sales contract. However, the contract so relied on was not produced by Jeffords then or at any time during the trial. He did not claim to be the procuring cause for sale of the property. In the evidence, which is substantial in nature, we find facts and circumstances clearly supporting the conclusion that Jeffords' claim of an exclusive contract was entirely fictional and not based on fact.

The Company owned an improved tract of approximately 27 acres at University and Snelling Avenues, St. Paul, Minnesota, that was sold in January, 1955, for $1,500,000, less depreciation and adjustments, the amount actually received by the Company being $1,334,504. One Paul Villaume, a distant relative of Ossanna, was a real estate dealer and procured the purchaser for this property. He was paid a commission of $37,500, being 2½% of the gross sales price.[28]

At meetings of the board of directors of the company (September 14 and 17, and December 30, 1954), the only commission discussed in connection with the sale was that due Villaume. Indeed, at the September 17 meeting, Ossanna assured the board there would be no additional commissions paid in connection with the sale. As late as January 14, 1955, in seeking release of the lien of the mortgage on the property, Ossanna and Towey certified to the Northwestern National Bank that the broker's commission was $37,500. On that day Villaume submitted his

28 Shortly after receiving the commission, Villaume gave $7,500 thereof to the Ossanna Foundation. The Government's theory was that as a part of the scheme and artifice to defraud, the Company paid in the form of a commission $7,500 more than it was obligated to pay to Villaume. This payment was the subject of Counts XII and XIII of the indictment. As we have seen, the court dismissed Count XIII and the jury acquitted on Count XII.

bill, and on January 17, 1955, pursuant to requisition signed by Ossanna, check was sent to Villaume for $37,500. Notwithstanding the prior assurances with respect to the amount of commission that would be paid, we find that on authorization of Ossanna, Larrick and Towey, Jeffords was paid $75,000 under the guise of a commission. This payment was in two checks, the first dated January 25, 1955, in the amount of $35,000, and the second under date of February 16, 1955, in the amount of $40,000. To afford justification for the payment of the $75,000, reliance was based on a contract which on its face gave Jeffords' company (J & C Holding Company) the exclusive right to sell the property "for one year from this date—April 15, 1954, to April 15, 1955" and under which the Company was obligated to pay to him a commission of 5% of the total sale price. This document was signed by Ossanna and Towey as president and secretary of the Company. To further justify the payment, and as authority for the purported contract, appellants rely upon action of the executive committee of the Company, as disclosed by minutes of the meeting of that committee supposedly held on April 12, 1954.[29] The evidence conclusively and convincingly established that the minutes were not prepared on the date of the indicated meeting but were in fact prepared and inserted in the minute book in the early part of 1955. The inference is quite clear that they were prepared at about the time the

29 These minutes recited in part: "There was presented to the Committee request for exclusive option on the sale of the company property at Snelling and University Avenues. This was made by the J & C Holding Company, real estate dealers at 1321 Nicollet Avenue. * * *On motion by Mr. Larrick, seconded by Mr. Aune, it was moved that the Executive Committee * * *instruct its officers to grant exclusive right of sale contract to the J & C Holding Company * * * for a period of ten months from April 15, 1954, on a commission basis of 5% * * *. In case of the sale of the property by J & C Holding Company, or any other sales agency, commission of 5% is to be paid * * *in two equal installments, not less than 30 days apart."

sale was made and the payment sent to Jeffords. Appellants contend that even though the minutes were prepared at a later date, the meeting was nonetheless held on April 12, 1954, and the minutes truly reflect the action taken. At best, this was a question of fact to be resolved by the jury, which had before it evidence of unusual circumstances, which, in our judgment, may properly be characterized as badges of fraud. The entire transaction gives basis for the conclusion that the preparation of the minutes, as well as the purported contract—were in fact fraudulent transactions—designed to give the appearance of legality.

While there was no direct evidence of kick-backs from Jeffords, his disposition of the $107,500 was revealed and proved interesting, if not significant. The commission of $12,500 (power plant) was deposited on July 17, 1954, and at the same time Jeffords withdrew $11,500 in cash. The $20,000 received in connection with the Currie Avenue property was deposited on November 18, 1954, and on the same date Jeffords withdrew $15,000 in cash. When the $35,000 was deposited, Jeffords withdrew $25,000 in cash and when he deposited the $40,000 he withdrew $30,000 in cash. He claimed in a statement to an agent of the Internal Revenue Service that after the latter two withdrawals he departed for Florida with the greater portion of $55,000 in the back of his automobile, with the intention of purchasing real estate but that he lost the entire amount betting on horses at races he attended in Florida.

TOWEY LOTS

As previously stated, James A. Towey was not tried because of illness. He was an active participant in this transaction which concededly resulted in a loss to the Company.

Since none of the appellants questions the sufficiency of the evidence to establish fraud in the disposition of this property, our review of the facts is limited to those which stand out in bold relief.[30]

In the early part of 1954 and in the presence of two employees of the Company and Towey, Larrick offered to sell certain lots along the Harriet Right-of-Way for $500. Towey accepted the offer, paid $500 to the Company and at his direction a deed dated March 1, 1954, was executed whereby the record title was conveyed to Bernard Heintz, an uncle of Towey. Heintz testified he knew nothing about the transaction. Approximately six months later Towey sold the lots for $5,500 and caused his uncle to execute a deed to the purchasers. The sale became the subject of a hearing before the Railroad and Warehouse Commission of the State of Minnesota in 1958. There is evidence that shortly thereafter Towey paid additional money to the Company. The suggestion in the briefs of appellants that the payment was in connection with the lots does not find support in the record. In any event, the evidence supports a finding that this transaction was the result of rank fraud, participated in not only by Larrick, who set the stage, but also by Ossanna, who, at a meeting of the board of directors of the Company, made the motion whereby the board was persuaded to approve the sale to Towey.

The foregoing summary of the evidence and our conclusions should suffice to dispose of the first issue—the sufficiency of the evidence to support the finding of fraudulent conduct in the disposition of the company's property which was the subject of the transactions we have reviewed.

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30 In his brief Larrick states: "No one would contend that the defendant Towey, masquerading as Bernard Heintz, in reselling this property to the Heutmakers, did not profit thereby and did not defraud the Transit Company."

This brings us to the key issue—was the fraudulent conduct the result of a single, overall scheme to defraud? Here, it is strenuously insisted that there is no evidence affording proof that appellants, particularly Larrick, Harry Isaacs, Fred Isaacs and Jeffords, knowingly joined, adhered to, and participated in a single scheme to defraud. Hence it is claimed that in light of *Kotteakos v. United States*, 328 U.S. 750, substantial prejudice resulted from a trial *en masse* of all appellants with acts of one being admitted against others.

The instant question is not new to the courts. Out of numerous cases general principles have evolved which have application here:

A fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of relationship of the parties and by overt acts, conduct and other probative circumstances. *Marbs* v. *United States*, 8 Cir., 250 F.2d 514, 522, 523, cert. den. sub nom. *Sarkis* v. *United States*, 356 U.S. 919; *Marx* v. *United States*, 8 Cir., 86 F.2d 245, 250; *Phelps* v. *United States*, 8 Cir., 160 F.2d 858, 867, cert. den. sub nom. *Peters* v. *United States*, 334 U.S. 860; *Madsen* v. *United States*, 10 Cir., 165 F.2d 507, 511. "Conspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan—rather they are inclined to cover their machinations, thereby casting upon the prosecution the burden, sometimes difficult, of establishing the conspiracy, and the overt acts in consequence thereof, by circumstantial evidence,—by actions of the conspirators." *Blumenfield* v. *United States*, 8 Cir., 284 F.2d 46, 53, 54, cert. den. 365 U.S. 812.

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " *Glasser* v. *United States*, 315 U.S. 60, at p. 80; where the evidence affords satisfactory proof that a conspiracy has been formed, "but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient." *Galatas* v. *United States*, 8 Cir., 80 F.2d 15, 24, cert. den. 297 U.S. 711; *McDonald* v. *United States*, 8 Cir., 89 F.2d 128, 138, 139, cert. den. 301 U.S. 697; *Marx* v. *United States*, supra, 86 F.2d 245, at p. 250. As pertinently stated by this Court in *Phelps* v. *United States*, supra, 160 F.2d 858, at p. 867: "Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so natural into position in the fagot as to convince that it is part of it." Cf. *United States* v. *Cohen*, 3 Cir., 197 F.2d 26, 29; *Nye & Nissen* v. *United States*, 9 Cir., 168 F.2d 846, 852, aff'd 336 U.S. 613; *Meyers* v. *United States*, 6 Cir., 94 F.2d 433, cert. den. 304 U.S. 583.

It is not necessary to support a finding of the existence of an overall scheme or conspiracy that each participant knew others involved therein or the precise part each was playing. *Lefco* v. *United States*, 3 Cir., 74 F.2d 66, 68, 69.

> "* * * (I)t is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are

> achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of corrolating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity." *Blumenthal* v. *United States*, 332 U.S. 539, at pp. 556, 557.

The substantive offenses proscribed by Title 18 U.S.C.A. §§ 1341 and 1343 (mail fraud and fraud by wire) are closely related to a conspiracy, proscribed by Title 18 U.S.C.A. § 371. The distinguishing feature is that the former may be conceived by one person, and the mails or wire must be used for purpose of executing the scheme, while a conspiracy requires an agreement of two or more to violate the law, and at least one overt act in furtherance of the conspiracy. In *Blue* v. *United States*, 6 Cir., 138 F.2d 351, 358, cert. den. 322 U.S. 736, the Court stated: "(w)hen a scheme to defraud is shared in by two or more, it becomes a conspiracy; the rules of evidence are the same as where a conspiracy is charged (*Robinson* v. *United States*, 9 Cir., 33 F.2d 238); and the act of each party in furthering the common scheme is the act of all."

Each participant in a scheme to defraud is responsible for the use of the mails and wire used to execute and carry out the scheme.

> " 'Where two or more persons jointly devise and execute a scheme to defraud by the use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter, during the exist-

> ence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mailing of a letter which one of his partners caused to be mailed in the execution of the scheme.' " *Baker* v. *United States*, 8 Cir., 115 F.2d 533, 540, cert. den. 312 U.S. 692.

See also *Steiner* v. *United States*, 5 Cir., 134 F.2d 931, 934, cert. den. 319 U.S. 774.

By applying the foregoing principles we conclude that there was substantial evidence from which the jury could find: (1) the existence of an overall scheme to defraud; (2) that the transactions under scrutiny were a part of that scheme; (3) that the appellants with knowledge of its existence, adhered to and participated in the scheme devised by one or more of them; (4) that as participants in the scheme, and for the purpose of furthering and executing the same, Ossanna, Larrick and Harry Isaacs used the mails or wire, or both; (5) that by express or implied agreement, a conspiracy was formed to commit the substantive offenses of mail fraud and fraud by wire, and the appellants were parties to or joined such conspiracy.[31]

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31 Judge Nordbye submitted the issue of a single, overall scheme and a conspiracy to the jury as follows:

> "The first question, therefore, which you jurors will have to determine is whether the Government has established beyond a reasonable doubt the overall scheme or plan to defraud, and loot, so to speak, the Transit Company of property, real and personal, which would be available by reason of abandonment or non-use on account of the conversion of the Transit Company transportation facilities from streetcars to buses. * * *
>
> "The Government does not contend that these defendants got together at one time and planned a scheme to defraud the Transit Company. It is sufficient if the scheme to defraud as alleged was conceived in the minds of one or more of the defendants. If it was, and the other defendants, with knowledge of the scope of the scheme, knowingly and intentionally entered into and participated therein, then as to such defendant or defendants, they would be

In reaching this conclusion we have applied the principle universally recognized, that if the evidence viewed in light most favorable to the Government is such that reasonable minds "might differ" then the question becomes one of fact for the jury to resolve, and not one of law to be determined by the courts. See and compare *Brennan* v. *United States*, 8 Cir., 240 F.2d 253, 259, cert. den. 353 U.S. 931; *Connelly* v. *United States*, 8 Cir., 249 F.2d 576, 585, cert. den. 356 U.S. 921; *Northcraft* v. *United States*, 8 Cir., 271 F.2d 184, 187.

The existence of an overall scheme finds support in the scope and magnitude of the fraudulent conduct. It extended to a substantial portion of the Company's property made available for disposition as the result of the conversion program. That property of varying characteristics was the subject of more than one transaction and different parties participated therein, does not necessarily negate the

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parties to the scheme and responsible in law for the acts of their fellow confederates in furtherance of the scheme, if committed during the existence of the scheme. * * *

* * * * * * *

"In summary, therefore, as to the mail fraud and wire fraud counts, in order to find any one of these defendants guilty, you must find that there was an overall scheme initiated by one or more of these defendants to defraud the Transit Company of its assets, real or personal, which were abandoned or made available for sale by reason of the conversion from streetcar transportation to bus transportation. If there has not been established such an overall scheme to defraud beyond a reasonable doubt, then no defendant can be found guilty of any of these counts.

* * * * * * *

"A conspiracy, members of the jury, is an agreement of two or more persons by concerted action to perform an unlawful act. One person alone cannot conspire. Two or more persons are indispensable. The essence of a conspiracy is a common design which actuates the parties. * * *

"The question you should ask yourselves, in light of the evidence is: Was there an agreement or understanding to loot or plunder the Transit Company, either express or implied, between two or more of the defendants named and embraced in that overall scheme that they would commit one or more of the unlawful acts charged in the conspiracy count of the indictment?"

existence of one common and broad objective, or conclusively establish that each transaction was the product of an independent agreement or scheme to defraud.

The scheme made its appearance in the methods adopted and pursued in the handling and disposition of the first item of surplus property—overhead scrap and rails. From this beginning in 1951 fraudulent conduct dominated the disposition of scrap until the last lot was disposed of in late 1955. The fraud intensified as scrap disposition progressed until, as aptly stated by the trial court: "* * * Ossanna and Larrick having laid the ground work so as to allocate to themselves complete control of the disposition of the underground cable, boldly permitted American, through Harry and Fred Isaacs, to write its own ticket, figuratively and literally, as to the price American was to pay for this scrap, with the resulting substantial monetary loss to the Transit Company." In the interim, the fraud made its appearance in other transactions to which we have alluded. Thus through the combined efforts of appellants, the Company was mulcted out of property of staggering proportions.[32]

The jury was entitled to consider the relationship of appellants to each other and to co-conspirators not named as defendants as an additional factor bearing heavily on the hypothesis of one scheme and conspiracy. The evidence indicated that Ossanna was the dominating character. He apparently masterminded the scheme and its fruition and played the leading role. Closely allied to Ossanna and col-

32 Loss from underground cable $815,000, Mexican notes $238,439, Hopkins Right-of-Way $75,000 (this is based on appraised value of property—Carlson and the Ossannas actually netted over $90,000 from the transaction), Jeffords' commissions $107,500, Towey Lots $5,000. Additionally, there was the loss from overhead scrap and rails, the amount of which does not appear with certainty. We have seen, however, that the Company was required to pay to the City of Minneapolis approximately $1,200,000. There was evidence from which the jury could find that a large portion of this expense should have been borne by American.

laborating with him in the machinations were appellant Larrick and defendant Towey. While their activities were not as prominent, it is apparent that without their assistance it would have been difficult to perpetrate and effectuate the fraudulent scheme. Appellant Harry Isaacs was not a direct actor in all the various transactions but he too performed an important role in the overall scheme. If not an originator of the scheme, he soon became a party thereto. His part in the fraud is made manifest from the scrap disposition (the scheme had its genesis in the handling of the scrap and it had its demise in the scrap). Harry Isaacs was the recipient of other Company property. In December, 1953, the Mid-Continent Development and Construction Company (a partnership consisting of Harry Isaacs, owner of 47½%, Robert Levitt, Isadore Blumenfield and four other business associates) purchased seven parcels of real estate from the Company and various items of scrap for $300,000. The partnership sold the property in 1954 and 1955 for a sum in excess of $465,000. The sale to Mid-Continent was consummated after Ossanna had received other offers and had executed option contracts on certain of the parcels. The court ruled that the amount paid by the partnership for the property ($300,000) was not so grossly inadequate as to furnish evidence of fraud, and dismissed these counts of the indictment. However, the court instructed the jury it could consider the evidence relating to this transaction to show relationship of the parties.[33]

There was other evidence showing the close relationship between Harry Isaacs and Larrick, two of the principal actors in the scrap transaction. In 1955 and near the

33 The court instructed the jury that there was no evidence that Ossanna or Isaacs knew of the Blumenfield group's interest in Mid-Continent.

termination of the scheme, Larrick loaned Isaacs $10,000. The trial court viewed this transaction with some suspicion, stating in his after-trial memorandum: "Many inferences may be suggested from that episode. In any event, it is significant that Larrick, an officer of the Transit Company, loaned a substantial sum of money to one who at the time was looting his employer of thousands of dollars."

The role of appellants Fred Isaacs and Jeffords, charged with and convicted of participation in the overall scheme, under the conspiracy count, while less prominent, was nevertheless important and essential in carrying out the scheme. Fred Isaacs was secretary of American Iron and as such was a party to the original scrap removal. He was active in the whole scrap program. The fraud he practiced was of the rankest kind, as manifested in the changing of weight tickets to the benefit of American Iron and to the loss of the Company. The fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof, and being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration.

Jeffords was a close associate of Ossanna and manifested more than a passing interest in the affairs of the Company. As a shareholder he became a member of Ossanna's stockholders' committee, which was successful in its endeavor to place Ossanna in control. As we have noted, he profited to the extent of $14,000 in the transactions involving the Hopkins Right-of-Way. His manipulations assisted in effecting the overall scheme whereby the Company paid to him a large sum of money without any consideration or benefit inuring to it.

The maze of circumstances furnishes adequate factual support for a finding that a common broad scheme and plan was conceived at or about the time the conversion program was initiated. As the scheme took form through concrete action, others joined as their efforts were required, so that a closely knit and relatively small group of men was drawn together, their efforts were united, and by devious, ingenious and unlawful means the common objective—looting the Company of substantial property—was effectuated. There were "insiders," Ossanna, Larrick and Towey; there were "outsiders" among them, Harry Isaacs, Fred Isaacs and Jeffords. From the ultimate result it becomes apparent that each fitted "so naturally into position in the fagot as to convince that [he was] a part of it." *Phelps* v. *United States*, supra, 160 F. 2d at p. 867.

Our holding does not run counter to the cases relied upon by appellants. They have been considered and in our view are distinguishable on the facts. No useful purpose will be served by an extended discussion of the factual elements present in the cases relied upon which required reversals of the judgments of conviction. We limit our examination to two opinions by the Supreme Court of the United States because of the urgent claim that they control.

In *Ingram* v. *United States*, 360 U.S. 672, the four petitioners and six others were convicted of a conspiracy to evade and defeat payment of federal taxes imposed on lottery operations. The Court held that the evidence was insufficient to support a finding that two employees of Ingram and Jenkins knew that the latter had not paid the taxes. In the course of the opinion the Court stated, at pp. 677-678:

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371 cannot be sustained unless

there is 'proof of an agreement to commit an offense against the United States.' *Pereira* v. *United States*, 347 U.S. 1, 12. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.' *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

" '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States*, *supra*. Cf. *United States* v. *Falcone*, 311 U.S. 205."

From the foregoing, the appellants have erroneously concluded that the accused must possess full knowledge of every detail of an unlawful scheme before he may be properly held to be a part of it. We do not regard the case as so holding. As pointed out in *Blumenthal* v. *United States*, 332 U.S. 539, at p. 557, conspirators may be found guilty "without requiring evidence of knowledge of all * * * details [of the conspiracy] or of the participation of others."

In *Kotteakos* v. *United States*, 328 U.S. 750, the only question was whether petitioners had suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government conceded and the court of appeals had found (*United States* v. *Lekacos*, 2 Cir., 151 F.2d 170) proved not one conspiracy but eight or more different ones of the same sort executed through

a common key figure. The Supreme Court, in distinguishing *Berger* v. *United States*, 295 U.S. 78, held that a defendant has "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others * * *." Having demonstrated the existence of substantial evidence to support the finding of a single overall scheme to defraud, the teachings of *Kotteakos* are clearly inapplicable. It is, of course, well settled that all parties joining a conspiracy, whether at the time it is formed or later, and who cooperate in the common effort to obtain unlawful results, assume responsibility for all that is done before or after becoming a party thereto. *Marbs* v. *United States*, supra, 250 F.2d 514, 522, cert. den. sub nom. *Sarkis* v. *United States*, 356 U.S. 919; *United States* v. *Compagna*, 2 Cir., 146 F.2d 524, 530, cert. den. 324 U.S. 867; *Lefco* v. *United States*, 3 Cir., 74 F.2d 66, 68.

We now direct our attention to the contention that in any event appellants are entitled to another trial. The claim is made that their rights were substantially prejudiced by the court's action in giving and refusing certain instructions, by its rulings on evidentiary matters and by the rebuttal argument of Government counsel.

Both indictments alleged that as a part of the scheme to defraud, Harry Isaacs and American Iron, having become obligated to the Company to fulfill substantial portions of its obligations to the City of Minneapolis, would be relieved of that obligation without consideration and at the expense of the Company. This portion of the indictments as well as considerable evidence bearing on the scrap transactions brought into focus the conversion ordinance adopted by the city in October, 1953, and to which prior reference has been made. More precisely, it became an is-

sue as to whether the ordinance was in fact a device or instrument to further the scheme and plan to defraud the Company. On this issue the defendants requested the court to give the following instruction:

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October, 1953 was procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company."

The court refused to give the requested instruction and proper exceptions were taken to such refusal, so that the court's action in that regard is preserved. The issue was submitted to the jury by the following portion of the court's charge:

> "It is the Government's contention that, to all intent and purposes, the contract of February 11, 1952, and the addenda thereto, were abandoned, and in pursuance of the scheme to defraud, American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and to repave where necessary; that in order to be relieved of the obligations of rail removal and repaving which American had assumed under the February 11, 1952, contract and its addenda, together with being relieved of snow removal and sanding of streets, and so forth, and other provisions of the franchise, the ordinance provided that Transit was required to pay to the City of Minneapolis some $900,000, * * *.
>
> * * * * * * *
>
> "What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its

duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, * * *? * * * (I)f you find that the agreement in that regard between the Transit Company and Minneapolis City Council was negotiated and made without fraud and not as a part of an alleged overall scheme to defraud, and if American Iron was in good faith ready, willing and able to perform the obligations expressed in its contract of February 11, 1952, and the two addenda, then the fact that, after that contract and addenda were executed, the conversion ordinance was enacted, the Transit Company was not discharged of its obligation to American under the contract of February 11, 1952, and the addenda, nor was American deprived of any of its rights under the contract and the addenda."

Although none of the defendants objected to the instruction, as required by Rule 30, Federal Rules of Criminal Procedure, four of the appellants, Ossanna, Larrick and the Isaacses, now assert error in the foregoing submission. While technically we would be justified in refusing to review the correctness of the given instruction, we have decided against that course. By offering the instruction and taking exception to its refusal, timely and specifically, the position of appellants was made known to the court. See and compare *United States v. General Motors Corp.*, 3 Cir., 226 F.2d 745, 750; *Hasselbrink* v. *Speelman*, 6 Cir., 246 F.2d 34, 39; Moore, Federal Practice, Vol. 5, § 51.04, p. 250. Moreover, consideration and determination of the question properly preserved (refusal of instruction) will entail exploration of whether the issue should have been submitted, and the correctness of the submission.

Specifically, the complaining appellants now contend that there was no evidence of fraud in the procurement of the conversion ordinance; that all negotiations and bargaining between the city officials on the one hand and the Company representatives on the other which were consummated in the adoption of the ordinance were at arm's length and in good faith; that there was evidence from which the jury could find that the contract of February 11, 1952, and the addenda thereto was a valid and binding agreement and that the terms thereof were being performed and complied with in every respect. Upon this factual premise appellants invoke the rule that where erroneous instructions are given on a basic issue, a conviction cannot be sustained on some other theory, even though "the appellate court is left without doubt" that the defendant is "guilty." *Bollenbach* v. *United States*, 326 U.S. 607, 614, 615; *Weiler* v. *United States*, 323 U.S. 606, 611; *Yates* v. *United States*, 354 U.S. 298.[36]

The instructions under consideration must be viewed in light of the evidence that was before the jury and the trial theory of the respective parties.

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36 *Bollenbach* presented an unusual situation. The Government conceded that the instruction under attack was an improper declaration of the law but argued that "the sting of error is extracted because there was proof, other than the erroneous 'presumption,' on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." 326 U. S. at p. 614.

Yates is also clearly distinguishable in that the erroneous instruction went to the controlling law of the case.

In *Weiler* the court held it was prejudicial error on the facts of this case to refuse an instruction as to the quantum of proof required in a perjury case and thus is clearly distinguishable from the question under consideration. The court recognized that even as to such a basic proposition, it is not always prejudicial to refuse such an instruction, citing *Goins* v. *United States*, 4 Cir., 99 F.2d 147; *Goins* v. *United States*, 306 U.S. 622, 323 U.S. at p. 611.

At the outset, it may be said unequivocally that there was no evidence of fraudulent conduct on the part of the city officials or representatives of the Company with respect to the adoption of the conversion ordinance and when so viewed it is crystal clear that there was no fraud in the procurement of the conversion ordinance. A mere reading of the proceedings of the meetings antedating the conversion ordinance convinces that the involved parties were negotiating and bargaining in good faith and at arm's length. But fraud in the actual procurement or adoption of the ordinance was never an issue—no one contended that it was—and indeed the Government expressly disavowed any fraudulent conduct between the Company and the city. The Government's theory was, and this became a major issue, that Ossanna entered into an arrangement with the Isaacses whereby they would ostensibly discharge the obligations of the Company to the city under the franchise agreement then in effect, well knowing such arrangement would never be carried out; that Isaacs' company, American Iron, would never be called upon or required to discharge its obligations under the contract, and that the Company would later of necessity be forced to further obligate itself to the city to secure removal of its property from the streets, to repave and otherwise improve the streets formerly occupied by Company property in order that the conversion program could actually be put into operation. It was in this factual setting that the Government contended that the adoption of the conversion ordinance was in fact a part of the scheme and device to defraud.

In summary, the jury was entitled to give consideration to the question of whether the conversion ordinance was another facet of the scheme to defraud. The refused instruction would have completely removed this issue and

any consideration thereof from the jury, hence the court's action in refusing to give it was not error.

We recognize that the language used in the given instruction could have been more explicit, and that standing alone and without regard to the evidence and the theory adopted by the parties, it might be susceptible to the interpretation which appellants now place thereon. However, when considered in light of the issue that was litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or submit an issue that was not supported by evidence.

Even assuming arguendo that the instruction did permit the jury to find that the conversion ordinance was procured by fraud, we are not convinced that such error was prejudicial. The appellants theorize that, absent this instruction, the jury could have found the contract between the Company and agreement for removal of the scrap was a bona fide agreement and that the parties were in good faith recognizing and complying therewith and that the finding of fraud with respect to the scrap may have been predicated upon fraudulent procurement of the conversion ordinance for which there is no evidentiary support. Thus, in effect, appellants would have us assume that the jury found no fraud in the scrap transactions even though the evidence of fraud, quite apart from the ordinance, was substantial, and that it did find fraud in the procurement of the conversion ordinance where there was absolutely no evidence of fraud. Although we cannot speculate on what may have been the basis for the jury's verdicts, we are not required to indulge in the assumption that a jury that deliberated for five full days and returned verdicts which demonstrated a clear and understanding grasp of the evi-

dence and the law, was a jury that lacked all common sense.

As we have seen, Ossanna, Larrick and Harry Isaacs were convicted of the substantive offenses of interstate shipments of property fraudulently obtained and they with Fred Isaacs and Jeffords were convicted of the conspiracy to commit the substantive offenses. The contention is now made by Ossanna, Larrick and the Isaacses that their rights were substantially prejudiced by the manner in which the interstate shipment counts were submitted to the jury. Specifically, it is asserted and argued that these alleged offenses should have been submitted as a part of the overall scheme and artifice to defraud the Company.[37] Additionally, these appellants also contend that the evidence was insufficient to justify a finding that the property transported was obtained by fraud, i. e., that the proper foundation was not laid in that respect. Ossanna and Larrick also argue that there was no evidence that they participated either directly or by concert in obtaining the property by fraudulent means or that they participated in the shipment thereof or derived any benefits therefrom.

In our view, it is unnecessary to consider or dispose of these claims of error. Firmly embedded in federal jurisprudence is the principle that a general sentence on several counts of an indictment will be sustained on appeal if

37 Counts XIV, XV and XVI covered the interstate shipments of property fraudulently obtained but did not charge that these offenses were a part and parcel of the overall scheme to defraud. However, the Government in response to motions for bill of particulars did claim that the fraud in connection with the property that was the subject of these counts was committed in fulfillment of the scheme and artifice which was alleged in the first count. During the trial the Government asserted that it was not necessary that a conviction under Counts XIV, XV and XVI be predicated on a finding that the offenses there charged were a result of the overall scheme. The trial court agreed and refused to submit the counts on that theory.

the defendant was properly convicted under any count which is good and which is sufficient in itself to support the judgment and sentence. *Barenblatt* v. *United States*, 360 U.S. 109, 115; *Lawn* v. *United States*, 355 U.S. 339, 359; *Bunn* v. *United States*, 8 Cir., 260 F.2d 313, 316; *Guon* v. *United States*, 8 Cir., 285 F.2d 140, 142.

The court imposed a general sentence on Ossanna, Larrick and Harry Isaacs on their convictions of Counts XIV, XV and XVI (interstate shipments) and XVII (conspiracy). The sentences thus imposed (four years imprisonment and $10,000 fine on Ossanna and Harry Isaacs, two years' imprisonment and $2,000 fine on Larrick) are within the limit of punishment authorized for conviction of conspiracy. Title 18 U.S.C.A. § 371.

We have demonstrated and held in our disposition of the main issue that there was substantial evidence to support the finding of an overall scheme and conspiracy, and the convictions of conspiracy. In this situation the complaining appellants were not prejudiced by the claimed erroneous submission of the interstate shipment counts.

Appellant Fred Isaacs contends that the trial court committed reversible error in refusing to strike certain testimony elicited from a Government witness.

Special Agent of the Internal Revenue Service, Judson H. Peterson, testified that on September 11, 1959, he and another special agent called on Fred Isaacs, primarily for the purpose of obtaining a specimen of his handwriting. Apparently the agents were making an investigation with respect to income tax returns filed by Harry and Fred Isaacs. During the conversation Harry Isaacs, who was also present, refused to give a sample of his handwriting and stated that his attorney had instructed him to furnish

records but to do no more than that. Then Fred Isaacs said something "about wondering why the Internal Revenue agents or Internal Revenue Service was investigating this case, and he mentioned something about newspaper publicity, * * *. Then Fred went on to say, he said, 'Answer one question,' and he brought up, as he called it, a problematical case, 'Of a *company like ours that stole from the Transit Company a lot* but reported the profits, why is the Internal Revenue in on it?' He said, 'it's something for the stockholders.' * * * Then Harry Isaacs stated, 'We are not the only ones that got something from this company. How about that guy in St. Paul? How about Northern States Power?' Then he went on to say, 'Is it because it came out this fellow Blumenfield is in Mid-Continent?' " (Emphasis supplied) Following this testimony the court recessed for a brief period, and upon proceedings being resumed, counsel for Harry Isaacs moved the court to strike Peterson's testimony to the effect that Harry Isaacs had refused to talk, but no motion was made to strike Peterson's testimony relating to Fred Isaacs nor was any objection registered with respect to the alleged statement by Fred Isaacs. To the contrary, counsel for the latter cross-examined Peterson at some length in regard to the statement and attempted to establish that the statement was hypothetical in character and further that Fred Isaacs was very cooperative during the interview. On re-direct examination the statement was again explored by Government counsel, at which time counsel for Harry and Fred Isaacs made this objection: "Objected to as not proper re-direct examination, Your Honor; repetition." Peterson's testimony completed the proceedings for the day, and the next morning, for the first time, counsel for Fred Isaacs moved the court to strike the italicized portion of Peterson's testimony on

the ground that the statement attributed to Fred was hypothetical in nature and could not under any circumstances be regarded as an admission against interest. The motion was denied and error is now assigned because of the court's action in that respect.

The state of the record brings into question the reviewability of the assignment now urged upon us. The rule is firmly settled that objections to evidence should be made as soon as it is apparent that the evidence is for any reason objectionable. This rule, of course, has a very salutary purpose. It affords the trial court an opportunity to act promptly in an effort to remove from the jury's consideration evidence which for any reason has no place in the lawsuit. We were confronted with a similar situation in *Marx* v. *United States*, 86 F.2d 245, and there laid down the rule in this language (86 F.2d at p. 251):

> "Again, it is noted that the testimony at which the motions are directed was for the most part admitted without objection, and the grounds for objection thereto were as apparent when the evidence was offered as at the close of the testimony. Counsel could not be permitted to sit idly by and permit the witnesses to testify, possibly hoping that his client might benefit thereby, and then, finding that the testimony was not beneficial, move to strike it out. Such a practice cannot be tolerated. It is only when evidence apparently admissible when offered is shown by subsequent developments to be inadmissible that the objection may be made in the form of a motion to strike out or by a request for an instruction that its effect be limited or that it be withdrawn from the consideration of the jury. *St. Louis & S. F. R. Co.* v. *Duke* (C.C.A. 8) 192 F. 306. Ordinarily, an objection to the introduction of testimony must be made at the earliest possible opportunity after the ground of objection be-

> comes apparent, or it will be held to have been waived, and a motion to strike out objectionable testimony must be made at the time the testimony is given if the ground of objection to it is then apparent."

The *Marx* case was cited with approval and followed by the Sixth Circuit in *Metcalf* v. *United States*, 195 F.2d 213, 216, where it is stated:

> "It is the well settled rule that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion, delayed until the close of the Government's case, to strike from the consideration of the jury evidence previously received without objection."

and by the Second Circuit in *United States* v. *Parnes*, 210 F.2d 141, 143. Thus the question to be resolved is whether under the circumstances of the situation we may now properly say the trial court abused its discretion in denying the motion to strike. It can hardly be gainsaid that if the statement of Fred Isaacs was an admission against interest, which is the position of the Government, then by all rules of evidence it was clearly admissible. See *Opper* v. *United States*, 348 U.S. 84; *On Lee* v. *United States*, 343 U.S. 747, 756; *Segel* v. *United States*, 8 Cir., 246 F.2d 814, 818, cert. den. 355 U.S. 894; *Hill* v. *United States*, 9 Cir., 261 F.2d 483, 489; *Moreland* v. *United States*, 10 Cir., 270 F.2d 887, 890; 22A C.J.S. Criminal Law, § 730; Wigmore on Evidence, 3 Ed. Vol. 4, § 1050.

Considering the circumstances under which the statement was made—the fact that Fred Isaacs knew that he was a suspect and that income tax returns with which he was connected were being investigated; that he was told

by the special agents that they took cognizance of other federal offenses, we are inclined to view the statement under question as an admission against interest and properly admissible. In any event, having in mind that the evidence of fraudulent conduct on the part of Fred Isaacs with respect to the scrap transactions was substantial, if not overwhelming, we are unable to perceive of any prejudice flowing from the court's refusal to strike the testimony.

The final assignment of error common to all appellants is that the Assistant United States Attorney in closing or rebuttal argument was guilty of such deliberate, repeated and flagrant misconduct as to seriously prejudice their right to a fair trial. We shall review the circumstances pertinent to this contention.

The arguments of counsel consumed a total of five days. All of July 25, 1960 and a portion of July 26 was required by Mr. Clifford Janes, Assistant United States Attorney, in presenting the opening argument for the Government. Counsel for defendants (five in number) presented their arguments on July 26 through July 28. Mr. Hyam Segell, Assistant United States Attorney, made the rebuttal argument which is the subject of attack and consumed all of July 29 in doing so. Not a single objection was made or voiced by any of the attorneys during the course of Mr. Segell's argument. However, after the conclusion thereof approximately sixty exceptions were taken by appellants' counsel. Judge Nordbye duly considered the exceptions and in his charge specifically instructed the jury to disregard certain portions of Mr. Segell's argument.

During oral argument, we were told that in failing to make any objection during the course of the claimed prejudicial remarks counsel for appellants followed the custom

or practice which has prevailed in the United States District Court for the District of Minnesota apparently since our opinion in *London Guarantee & Accident Co.* v. *Woelfle*, 8 Cir., 83 F.2d 325, 338-344.[38] That case was decided in 1936 and prior to the effective date of the Federal Rules of Civil Procedure in 1938, and the Federal Rules of Criminal Procedure in 1945. However, subsequent to the adoption of the rules we stated in another civil case, *Chicago & N. W. Ry. Co.* v. *Green*, 8 Cir., opinion filed October 27, 1947, 164 F.2d 55, at p. 64:

> "A party is not entitled as a matter of right to seek a reversal for improper argument to the jury, where he fails to make objections during its course, *or to take exceptions promptly at its close.*" (Emphasis supplied).

Our attention has not been directed to a criminal case where we had occasion to deal with the question and independent research fails to disclose that we have considered the matter. Other circuits have spoken on the subject. The Second Circuit held by implication, if not directly, that Rule 51, Federal Rules of Criminal Procedure (same as Rule 46, Federal Rules of Civil Procedure) contemplates that the objection should be made at the time of the improper argument. In *United States* v. *Kyle*, 257 F.2d 559, cert. den. 358 U.S. 937, at p. 564, that Court stated:

> "What defendants now characterize as 'inflammatory and personal vituperation' and a 'heated appeal

38 We note, however, in Fred Isaacs' brief, this statement appears: "At the outset, the prosecutor carefully forestalled any challenge by defense counsel or possible rebuke by the trial court during the course of his argument, by blandly assuring the jury that 'it is a courtesy among lawyers not to interrupt each other in final argument.' *The supposed custom is not evidenced by the record (and was, indeed, unknown to other counsel)*, but defense counsel could not thereafter object to any misstatement during the course of the argument without incurring the risk of offending the jury." (Emphasis supplied).

> to passion' by the prosecutor on summation apparently failed to stir either of them or their counsel *at the time* of the utterances into voicing an objection or a request for a direction from the court. Rule 51, Fed.R.Cr.P., 18 U.S.C.A." (Emphasis supplied).

Even before the rules were adopted, the Seventh Circuit, in *Paschen* v. *United States*, opinion filed April 12, 1934, 70 F.2d 491, at p. 502, made this observation:

> "* * * the ordinary method for undertaking to keep overenthusiastic counsel within fairly reasonable bounds is to call the court's attention from time to time to alleged departures, and to procure from the court a ruling and direction with reference thereto. It does not appear that *at any time during* the argument objection was made to the things now urged as error, and we do not find these so palpably improper as would justify us in taking notice of them without timely objection, and thus to give opportunity for correction, if correction is necessary." (Emphasis supplied).

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, opinion filed May 6, 1940, the question was not an issue, but we note that the Court did state at p. 240:

> "Under the second of these objections, respondents complain of the plea to the jury not to 'let your Government and the United States and its citizens and society down,' and that government counsel 'believe to the bottom of their hearts in the justice of the cause that they espouse here.' No objection *at that time* was made by defense counsel." (Emphasis supplied).

In a situation where, as here, the claim is made that the prosecutor engaged in making repeated prejudicial statements to the jury throughout his argument and from the

inception thereof, we believe the better practice is to make objection at the time of the asserted prejudicial utterances. This will afford the court an opportunity to properly warn the prosecutor that improper argument will not be tolerated, and to promptly take action designed to more effectively remove from the minds of the jury the sting or poison of the prejudicial statement. This is the practice that has been adhered to in a number of criminal cases. See and compare *Mellor* v. *United States*, 8 Cir., 160 F.2d 757, 765, cert. den. 331 U.S. 848; *Myres* v. *United States*, 8 Cir., 174 F.2d 329, 338, cert. den. 338 U.S. 849; *Greenberg* v. *United States*, 1 Cir., 280 F.2d 472, 474; *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, 342; *Weathers* v. *United States*, 5 Cir., 117 F.2d 585, 596, cert. den. 316 U.S. 681; *Henderson* v. *United States*, 6 Cir., 218 F.2d 14, 21, cert. den. 349 U.S. 920.

Since it is apparent that all of the parties and the court regarded what transpired as being sufficient to preserve the right of appellants to have the argument to which exceptions were taken reviewed on appeal; we have proceeded accordingly.

While the propriety of the argument of Government counsel in criminal prosecutions has been the subject of consideration in many cases, no exact or precise test or standard may be applied to all situations. The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial. It is not amiss for us to again point out that in a criminal case, the United States Attorney has imposed upon him a high and important responsibility. He should present the Government's case with vigor and earnestness, and use all legitimate means to bring about a just conviction, but, like-

wise, he must refrain from indulging in tactics or methods calculated to produce an unjust conviction. In *Berger* v. *United States*, 295 U.S. 78, heavily relied on by appellants, the Supreme Court gave this admonition, at p. 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

While the "improper methods" test is broad in its meaning, "* * * each case necessarily turns on its own facts." *United States* v. *Socony-Vacuum Oil Co.*, supra, 310 U.S. at p. 240. Thus, we are required to determine whether in light of all the facts and circumstances, with particular emphasis on all of the arguments, the utterances complained of so influenced the jury as to bring about an unjust conviction.

We deem it unnecessary to enumerate and discuss the numerous objections to Mr. Segell's argument. It is sufficient to say that the alleged prejudicial remarks may be characterized, generally, as being—one, outside the record and beyond the scope of the record; two, defamatory and derogatory of defendants and their counsel, and three, personal opinion and belief of guilt of the defendants. In

reaching our conclusions, it should be kept in mind that we are permitted to examine "only the cold print of the record, and therefore should weigh carefully the findings of the trial judge, who saw and heard the actual events, and found no prejudice. See *United States* v. *Holt*, 7 Cir., 1939, 108 F.2d 365 and *Tuckermann* v. *United States*, 6 Cir., 1923, 291 F. 958, 959." *Orebo* v. *United States*, 9 Cir., 293 F.2d 747, at p. 749. We have nonetheless meticulously examined and analyzed all arguments and have independently concluded that the utterances complained of, when viewed in context and in light of all circumstances, were not calculated and designed to produce an improper conviction and did not in fact have that effect. Judge Nordbye was of the opinion that Mr. Segell's argument in some respects went beyond the bounds of propriety, and specifically instructed the jury to disregard the improper statements.[39]

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39 In summary, the court instructed the jury that there was no evidence to support Mr. Segell's statement that the case was comparable to the fraud case of one Wilbur Foshay and the jury was instructed to disregard that statement; that there was no evidence to support Mr. Segell's statement that there was any money fraudulently passing back and forth between or among the defendants from the Jeffords commission transaction, or the Isaacs scrap transaction or the Francis commission payment; that any comment by Mr. Segell as to the position occupied by the defendants and their attorneys in the court room during the trial was without significance and any reference thereto was to be disregarded by the jury; that "(c)ounsel sometimes refer to their own personal opinions, or their own views or their own knowledge in their arguments. Well, unless such opinion or views or knowledge are based upon the evidence, they will, of course, be disregarded by you." The jury was instructed to disregard the statement by Mr. Segell to the effect that certain counsel for defendants during their arguments had "inspirational moments of truth." In this connection, the court stated to the jury: "I rather think Mr. Segell was indulging in some flights of oratory in using that expression, and he made use of it with reference to the arguments of Mr. Dienard and Mr. Smith. Well, in any event, such statements must not be taken by you as any reflection on the manner in which either of these counsel have conducted their defense, or as having any bearing upon the sincerity of the arguments which these lawyers have made in behalf of their clients." During his argument Mr. Segell referred to Mr. Jeffords as a "pathological liar." The court stated to the jury that "There is no evidence to sustain that statement, and that argument will be disregarded by you."

We cannot escape the conclusion that most of the objections to the argument resulted from hypercritical counsel who were, as aptly stated by Judge Nordbye, "overly sensitive" and who "with microscopic captiousness, find fault with the most innocuous statements of government counsel." We are mindful that prior to the commencement of arguments the trial of this case had consumed 63 working days. It was a bitterly fought contest with no quarter being asked and none being given by either side. "* * * (S)ome latitude must be given to lawyers' language in a hard fought case." *United States* v. *Kravitz*, 3 Cir., 281 F.2d 581, 586, cert. den. 364 U.S. 941. "In the heat of oral arguments and summations counsel sometimes use language they would not have used under less trying circumstances, and in order for such comment to constitute reversible error the language used must have been plainly unwarranted and clearly injurious. *La Feber* v. *United States*, 8 Cir., 59 F.2d 588." *Mellor* v. *United States*, 8 Cir., 160 F.2d 757, 765, cert. den. 331 U.S. 848. It is, of course, well settled that counsel for the Government is accorded the privilege of arguing to the jury all possible inferences which reasonably flow from the evidence. *Kempe* v. *United States*, 8 Cir., 160 F.2d 406, 411, cert. den. 331 U.S. 843; *Mellor* v. *United States*, supra, 160 F.2d at p. 765, cert. den. 331 U.S. 848; *Gray* v. *United States*, 8 Cir., 14 F.2d 366, 367.

It also appears that portions of the argument said to be prejudicial were motivated by statements made by defense lawyers in their arguments and consequently fall within the rule that prejudicial error does not result from improper remarks in closing arguments invited or provoked by opposing counsel. *Myres* v. *United States*, 8 Cir., 174 F.2d 329, 339, cert. den. 338 U.S. 849; *Brennan* v. *United*

States, 8 Cir., 240 F.2d 253, 263-264, cert. den. 353 U.S. 931.

In the final analysis the question before us is not whether Mr. Segell's argument was in certain respects beyond the bounds of propriety and improper, but whether it was prejudicial and prevented the jury from exercising freedom of judgment and thought in its deliberations. Of vital, if not decisive, importance is what transpired after the so-called prejudicial argument was delivered. The jury received the case at 5:30 p. m. on August 1, 1960, and deliberated until the morning of August 6 when the verdicts were returned. Defendant Blumenfield, who was the subject of some of the challenged argument, and whom the Government was manifestly interested in convicting, was acquitted by the jury.[40] Defendants Ossanna, Larrick and Isaacs were also acquitted of certain counts of the indictment. The sum total of the result demonstrates convincingly that the jury adhered to the court's admonition "to analyze and weigh all of the testimony you have heard so as to enable you to determine intelligently the factual issues which will be submitted to you. Then you are to apply the law which the Court gives to you to the facts as you may find them to be from the evidence so that justice may be done between the Government and these defendants." Certainly the time consumed in deliberating and the verdicts that were returned indicate unusual discernment on the part of the jury and should dispel any feeling that it was improperly influenced, prejudiced or misguided by anything that was said by Government counsel. The gross misconduct of the prosecutor in *Berger* v. *United States*, 295 U.S. 78, renders that case

40 Defendant Blumenfield was convicted of a Mann Act violation in the United States District Court for the District of Minnesota and his conviction was affirmed by this court. *Blumenfield* v. *United States*, 284 F.2d 46, cert. den. 365 U.S. 812.

inapposite. There, improper cross-examination was resorted to in that the prosecutor among other things assumed prejudicial facts not in evidence, bullied and argued with witnesses and in general conducted himself in a "thoroughly indecorous and improper manner." (p. 84) This infraction was compounded by an argument which the Supreme Court regarded as "pronounced and persistent." (p. 89) In reversing, the court looked beyond the improper conduct and concluded that "* * * [T]he case against Berger * * * may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record." 295 U.S. 78, at p. 89. Significantly, the court also stated, at p. 89: "If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached." Here, there is no claim or suggestion that either of the Assistant United States Attorneys who prosecuted the case engaged in conduct during the trial which transgressed upon the rights of appellants and, unlike *Berger*, we cannot characterize this as a weak case. To the contrary, there was substantial and cogent proof pointing to the guilt of appellants.

The Supreme Court of the United States was again concerned with the argument of Government counsel in *United States* v. *Socony-Vacuum Oil Co.*, supra. As a reading of the opinion discloses, 310 U.S. pp. 238-243, counsel for the Government engaged in an argument which the Court regarded as "undignified and intemperate" and not comporting

> "with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the

> minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was *Berger* v. *United States*, 295 U.S. 78, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct 'that we are not justified in assuming its non-existence.' " 310 U.S. at p. 239.

The Court's concluding remarks and observation on the subject of alleged improper argument are apropos here: " 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand.' " 310 U.S. at p. 243.

Anent the claim of procedural errors, the record attests to the patience and judicial poise maintained by the experienced and distinguished jurist who presided over the trial. His rulings demonstrate understanding, fairness, impartiality, and wisdom. Both the Government and the appellants were represented by able, experienced and vigorous trial lawyers. The record is replete with objections, motions, etc., and in every instance where necessary Judge Nordbye accorded all parties a full opportunity to be heard before ruling. While it is extremely difficult, if not impossible, for a trial of this nature to be conducted without error of some degree, we are convinced that none of the court's rulings was prejudicial, and that appellants were given a fair trial.

The judgments are

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX

District Court Opinion

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,
Plaintiff,

vs.

Fred A. Ossanna,
James H. Towey,
Benson M. Larrick,
Isadore Blumenfeld,
also known as Kid Cann,
Harry H. Isaacs,
Earl A. Jeffords,
Defendants.

No. 4-59 Criminal 77

United States of America,
Plaintiff,

vs.

Fred Isaacs and Theodore Landy,
Defendants.

No. 4-60 Criminal 13

ORDER

This case is now before the Court on the several motions of the defendants Ossanna, Larrick, Harry Isaacs,

Jeffords, and Fred Isaacs for judgments of acquittal, or, in the alternative, for a new trial.

Mr. Ray G. Moonan, of Minneapolis, Minnesota, and Mr. Sidney P. Gislason, of New Ulm, Minnesota appeared in behalf of defendant Fred A. Ossanna;

Mr. Robert J. King, of Minneapolis, Minnesota, appeared in behalf of defendant Benson M. Larrick;

Mr. Donald K. Smith, of Minneapolis, Minnesota, appeared in behalf of defendant Earl A. Jeffords;

Mr. Benedict S. Deinard and Mr. Melvin H. Siegel, of Minneapolis, Minnesota, appeared in behalf of defendants Harry and Fred Isaacs;

and

Mr. Clifford Janes, Assistant United States Attorney, and Mr. Hyam Segell, Assistant United States Attorney, of St. Paul, Minnesota, appeared in behalf of the United States of America.

The defendant Ossanna was found guilty of the first, second, third, fifth, sixth, seventh, eighth and ninth counts; not guilty of the twelfth count; and guilty of the fourteenth, fifteenth, sixteenth and seventeenth counts of the indictment in Case No. 77.

The defendant Larrick was found guilty of the same counts and not guilty of the twelfth count of the indictment in Case No. 77.

The defendant Harry Isaacs was found guilty of the first, second, third, fifth and sixth counts; not guilty of the seventh, eighth, ninth and twelfth counts; and guilty of the fourteenth, fifteenth, sixteenth and seventeenth counts of the indictment in Case No. 77.

The defendant Jeffords was found guilty of the seventeenth count of the indictment in Case No. 77.

The defendant Fred Isaacs was found guilty of the conspiracy count of the indictment in Case No. 13.

Each of the moving defendants urges that the evidence will not sustain a finding of one single scheme to defraud under the mail or wire fraud statutes, or under the conspiracy statute. Rather, it is earnestly contended that the Government merely proved unrelated acts of these defendants or episodes which cannot be created into a structure of the overall scheme which the Government attempted to present. Hence, it is argued that the Government in effect required each of the defendants to defend as to certain unrelated acts of the others. Admittedly, if the defendants are correct, the hypothesis of one single scheme cannot stand and the motion for judgments of acquittal as to these counts should be granted. However, the difficulty under the evidence is not the hypothesis of one scheme or conspiracy, but rather who the knowing and intentional participants were in the overall plan, as alleged in these counts, to loot the Transit Company in the transition of that company from streetcar to bus transportation.

The Court fully recognizes that, in a long and protracted case such as this, there were times when the entire picture of the overall operations of the participants of the scheme charged did not stand out in bold relief, and to utilize a hacknayed illustration, it was not too simple to recognize the forest on account of the trees. But a fair and realisitic consideration of the entire record fully sustains the jury's finding as to the overall scheme and conspiracy to defraud as alleged in the indictment. The genesis of the overall scheme to defraud is to be found in the handling of Transit scrap by American Iron & Supply Company,

which was countenanced, approved, and knowingly aided by defendants Ossanna and Larrick. Thereafter, it was extended into what may seem at first blush to have been unrelated fraudulent activities, but all of the fraud which followed pertained to surplus property available for disposition by one or more of the defendants who were officers of the Transit Company.

It is the Court's view, therefore, that the jury was justified under the evidence in finding that there was such an overall scheme; that is, that the common purpose to defraud the Transit Company out of substantial sums of money was manifested by the handling of the Transit scrap, the Mexican notes, the Harriet lot transaction, the Hopkins right-of-way, the Jeffords real estate commissions, and the Villaume so-called commission kick-back. These were not mere isolated, unrelated schemes to defraud the Transit Company on the part of one or more of the defendants, as the defendants contend. They were part and parcel of a general purpose, a well-defined pattern to syphon off and divert moneys and property obtained from the surplus conversion properties over which one or more of the defendants had control. Moreover, the mere fact that the evidence did establish that one or more of these transactions may have been initiated in good faith and later became fraudulent does not negate the evidentiary value thereof in support of the overall scheme. The Midcontinent transaction, for instance, while not in and of itself fraudulent clearly throws light upon the close and intimate relationship between Ossanna, Larrick and Harry Isaacs, and the intent of the parties.

The very first contract for the purchase of scrap that Harry Isaacs had with the Transit Company in behalf of American Iron & Supply Company was fraudulent. He,

with the consent of Transit officials, became the highest bidder for Transit scrap by the manipulation of bids before the conversion program was under way. Then he was allotted the right to remove tracks and overhead wires at the inception of conversion without any formal contract. It was a mere letter arrangement accepted by Mr. Ossanna, and when Transit's public accountant protested the informality of this arrangement, which purported to cover the entire Minneapolis overhead wires and tracks, and after some six months of indifferent compliance by American, the formal contract, Government Exhibit BZ, was entered into. If there was any good faith effort on the part of American through Harry Isaacs to carry out either the letter or contract arrangement as to the removal of the tracks and overhead wires in Minneapolis, the evidence fully warrants the finding that Ossanna, Larrick and Harry Isaacs soon paid mere lip service to the original contract and the two addenda thereafter entered into. These contracts were the vehicles fraudulently utilized to enrich Harry Isaacs and his company with many hundreds of thousands of dollars wrongfully abstracted by underpayment to the Transit Company for underground cable and other scrap, and relieving American as a third-party beneficiary of its contract obligation relating to removal of tracks and the repaving of streets, the plan in that regard culminating in the passage of the City Ordinance which obligated the Transit Company to pay the City of Minneapolis some $900,000, plus special work not to exceed $300,000 in value to be performed by the Transit Company for the City in connection with the conversion.

The contention of defendant Harry Isaacs that American never purchased the underground cable from Transit, but that it was to have this cable for its labor and expense

in removing it is simply incredible in view of the conduct of the parties. While that assumption may have been a permissible construction of the contract, the parties never operated under such construction, and if they had, American would have been required to remove the tracks and do the necessary repaving of streets in Minneapolis, of which obligation it was relieved by the payment of some $900,000 by Transit to the City of Minneapolis. The undeniable fact is that defendants Ossanna and Larrick having laid the groundwork so as to allocate to themselves complete control of the disposition of the underground cable, boldly permitted American, through Harry and Fred Isaacs, to write its own ticket, figuratively and literally, as to the price American was to pay for this scrap, with the resulting substantial monetary loss to the Transit Company.

The question arises, however—are all of the incidents of alleged fraud relied upon by the Government in support of the overall scheme competent and relevant as to each of the named defendants? As to the defendant Ossanna, there can be no question as to the relevance and competency of the other so-called incidents in that he actively and knowingly participated in each of the other episodes relied upon by the Government except the Towey Harriet lot transaction. He was the dominant figure of the Transit Company in the scrap fraud, the Mexican notes transaction, the Jeffords commission, and the Hopkins right-of-way deal with Carlson. Although he was found not guilty of Count 12, the remaining Villaume count, the way that that commission deal was handled is illustrative of the manner in which benefits flowed to this defendant or his nominees from the disposition of the surplus Transit property made available on conversion.

Although one may conclude that defendant Larrick's

participation in the other incidents bearing upon the overall scheme to defraud was not as prominent or as inclusive as the defendant Ossanna's, nevertheless his activities in addition to the scrap fraud were numerous. It may be argued that his first dealings with the Mexican notes would indicate a bona fide attempt to dispose of them to the best advantage to the Transit Company, but his participation in the George Francis deal, the fantastic Jeffords commission payment, and the Hopkins right-of-way sale, fully justified the jury in making a finding that he had succumbed to the temptation to knowingly and intentionally participate with Ossanna and others in the plan and scheme to defraud the Transit Company out of substantial assets which would inure to that company during conversion. And as indicative of the close relationship between Larrick and Harry Isaacs during this period, it may be noted that the evidence disclosed that Larrick loaned Harry Isaacs $10,000 during the conversion program, which was allegedly repaid in a year's time. Many inferences may be suggested from that episode. In any event, it is significant that Larrick, an officer of the Transit Company, loaned a substantial sum of money to one who at the time was looting his employer of thousands of dollars.

Harry Isaacs was not an officer or director of the Transit Company, but his close relationship with the officers thereof, particularly Ossanna, is reflected in the scrap and Midcontinent transactions. Although he did not participate in the other real estate or the Mexican notes transactions, it seems inconceivable that the gigantic, long-continuing scrap fraud practiced in the name of American Iron could have been accomplished by that corporation without the knowing and intentional connivance of its chief officer.

director and stockholder. In view of the active participation of both Isaacs and Larrick in the general objects and purpose of the overall scheme, they cannot complain that, in the evidence offered to establish that scheme, one or more of their fellow schemers and conspirators garnered additional illgotten gains pursuant to the general plan that motivated each of these two defendants.

In arriving at this conclusion, the Court has given due consideration to Kotteakos v. United States, 1946, 328 U.S. 750, together with Schaffer v. United States, 362 U.S. 511, rehearing denied, 363 U.S. 859; Berger v. United States, 1935, 295 U.S. 78; and Canella v. United States, 1946, 157 F.2d 470. The common purpose which motivated these defendants through planned action in bilking the Transit Company out of property made available to it during conversion amply fulfills the requirements and teachings of the Kotteakos case.

The charges against the defendants Jeffords and Fred Isaacs are limited to the conspiracy count. Fred Isaacs was Secretary of the American Iron & Supply Company. In that capacity, he was a party to the original scrap removal contract and the two addenda. He was active in the entire scrap removal program, and personally changed many of the weight tickets so as to enable American to account for false weight on scrap purchased from Transit. The dominant fraud in the conspiracy count was the scrap fraud. The circumstances are sufficient to justify a finding of Fred Isaacs' knowing participation in this fraud with his father, Harry Isaacs. They were the chief executive officers of American. They controlled and directed the affairs of that company. All of the circumstances disclosed by the evidence amply establish that fact. The greater part of the trial was devoted to the scrap fraud. Being a party to the

dominant part of the overall conspiracy to defraud. Fred Isaacs cannot complain of prejudice by reason of the fact that evidence was introduced to show that his fellow conspirators launched into other fraudulent activities directed to the same general objectives, to wit, to defraud the Transit Company of real and personal property made available for disposition by reason of the conversion.

Perhaps a more difficult question arises with reference to the defendant Jeffords. That he was engaged in fraudulant real estate commission dealings with the defendants Ossanna and Larrick seems fully supported by the record. One could not fairly interpret the testimony otherwise. That these transactions were a part of the overall fraudulent scheme in which Ossanna and Larrick participated is likewise sustained by the evidence. But did Jeffords, according to the evidence, have knowledge of the objects and purposes of the conspiracy alleged, or did he merely participate in one phase of the scheme without knowledge of the objects and purposes of the overall plan and scheme set forth in the seventeenth count of the indictment? Jeffords did have an interest in the Hopkins right-of-way, which he disposed of to Carlson. When he received fraudulent real estate commissions on three distinct real estate transactions, it is clear that he was the prime mover in transactions of considerable magnitude which the jury must have found was part of the overall scheme to defraud and not an isolated fraudulent transaction. The Court charged the jury as to Jeffords in part as follows:

> "Coming now to the defendant Jeffords, you will understand that he, as well as the other defendants, cannot be found guilty of the conspiracy charge lodged against him and them unless he or they are, or were, a knowing and intentional party to the conspiracy count as alleged. That is true even though

there may have been something wrong or even fraudulent about the commission paid Jeffords, although I am not intimating one way or another as to the legitimacy of his commissions or payments. But I say, however you may find as to the commission or compensation paid him, you must find from all the evidence that, with knowledge of the conspiracy and its objectives and purposes, as set forth in th 17th count, he knowingly and intentionally became a party thereto.

"Well, consider the payments to Jeffords. Was there a bona fide, good faith basis for these payments? Or were they wrongful allowances of commission or payment to Jeffords in furtherance of an overall scheme to defraud the Transit Company? That question, members of the jury, will have to be determined by you in light of all the evidence. If the commissions or payments were in whole or in part wrongful and fraudulent, did he knowingly and intentionally enter into the conspiracy charged?"

Now, the jury necessarily answered that question in the affirmative, and construing the evidence in the most favorable light to the Government, the Court should not disturb that finding. Moreover, I am convinced that in making that finding Jeffords was not prejudiced by reason of the evidence as to other episodes of fraud which were part of the conspiracy and as to which Jeffords was not an active participant.

The defendants stress the fact that the timing of the various episodes upon which the Government relies to establish an overall scheme negates the Government's position in that regard. They seek to emphasize that the scrap deal had been substantially completed before the Mexican notes disposition, the Jeffords' commissions, and the Hopkins right-of-way deals came into fruition. But the disposi-

tion of the surplus property made available by conversion had not been completed, and the evidence is clearly subject to the interpretation that the plan contemplated that if and when circumstances would enable the schemers and conspirators to fraudulently divert conversion assets, such efforts would be, and were, made.

It is argued, for instance, that the officers of the Transit Company, including Ossanna, attempted to dispose of the Hopkins right-of-way in good faith and at the highest price that could be obtained, and it was only when such efforts bogged down that the property was sold for $10,000 to Carlson. Well, obviously, it is not necessary for the Government to establish the premise that each and every disposition of surplus conversion property was contaminated with fraud, or that in every instance fraud was the initial objective. Undoubtedly, there were occasions when circumstances suggested to the participants the inadvisability of any fraudulent conduct with reference to the disposition of surplus property. The record here does not disclose all the various deals which were made with reference to the disposition of the surplus conversion property. But it is fair to find from the record that, in the disposition of all the major properties, real and personal, which became available by reason of conversion, it was contemplated at some stage in the conversion program, if conditions were favorable and if opportunities were presented, that there would be either outright fraud practiced as against the Transit Company or special consideration given to one or more of the defendants.

The evidence as to the mailings is not in serious dispute, except that defendants urge that the evidence is not sufficient to establish the mailings alleged in the fifth and sixth counts. These counts pertain to mail matter from

Larrick to Harry Isaacs and from American to Transit in connection with Transit scrap. It is true that there was no direct testimony that on these letters were affixed United States postage stamps and that they were delivered by and through the United States mails. However, although the cases do require definite and convincing testimony as to the use of the United States mails in furtherance of a scheme to defraud, circumstantial evidence can establish the mailing beyond a reasonable doubt as well as direct evidence. Here, these two companies, American and Transit, were engaged in a long and continuing business transaction whereby American accounted for the weights of the scrap purchased, Transit invoiced American based on the weight information, and American accounted therefor to Transit by check. The usual and common practice of each company in carrying on business transactions in this manner was by United States mail. There was no evidence or even suggestion that the parties departed from this custom and practice in their protracted business dealings as above outlined.

The letters described in these two counts were conveyed from Transit to American and from American to Transit. There is no evidence that they were transported by carriers other than the United States mails, or that any practice other than by mail carriage had been followed by these two companies. Certainly, the only reasonable and convincing inference that can be drawn from the undisputed circumstantial evidence is that the United States mails were used, and if so, unquestionably for the purpose of executing the scheme to defraud.

Troublesome questions arise in determining whether the mailing of the annual reports in 1955, 1956 and 1957 as alleged in Counts 1, 2 and 3 come within the requirement

of the mailing under the terms of the mail fraud statute and as further limited by the recent case of Parr v. United States, 363 U.S. 370. The pertinency of these mailings is the omission of substantial accounts receivable owing to Transit by American Iron & Supply Company. A failure to disclose the shortages in moneys due Transit from American would enable the officers to prolong their activities by concealing from the stockholders the true situation. The question may not be entirely free from doubt, but I am persuaded that the finding of the jury that those mailings were made for the purposes of executing the overall scheme to defraud should not be disturbed.

Defendants Ossanna, Larrick and Harry Isaacs urge that the Court erred in separating out from the overall scheme to defraud Counts 14, 15 and 16, and hence these counts should not have been submitted to the jury on the question as to whether the cable scrap and/or feeder cable referred to in these counts were obtained by fraud, that is, the fraud which allegedly occurred when this material was sold by Transit to American. Although the response the Government made on October 16, 1959, to the defendants' demand for a bill of particulars as to these counts may have been somewhat ambiguous, there is no sound basis for defendants' contention that they were prejudiced by the Court's ruling as to these counts. There is an absence of any showing that these defendants would have cross-examined government witnesses any differently or presented their evidence in any other manner by reason of their contention that they understood that the fraud alleged in these counts was the overall scheme to defraud set forth in Count 1 rather than the particular fraud which pertained to the underground cable and overhead feeder cable. They were accorded a full opportunity to meet the Government's evidence as to these three counts. The evidence

satisfactorily and persuasively established that the underground cable and feeder cable referred to in these counts were shipped in interstate commerce; that the value of such shipments exceeded $5,000; and that the material in the shipments had been obtained by fraud. The jury was justified in finding that not only the underground cable but the feeder cable as well had been obtained by fraud.

That Harry Isaacs, who controlled and directed American, caused these shipments to be made in interstate commerce should be free from doubt. His activities as disclosed by the evidence in the scrap deals with Transit will permit no other conclusion. Undoubtedly, a more difficult question arises as to whether Ossanna and Larrick knowingly and intentionally aided and assisted Harry Isaacs in causing these shipments to be made. These two men, however, were active participants in the fraud. Therefore, we commence with the premise that both Ossanna and Larrick, by their conduct, enabled American to fraudulently obtain a large quantity of underground and feeder cable to dispose of in the usual and customary manner in which scrap dealers would handle such scrap, to wit, to be shipped in interstate commerce to the mills which would reclaim the lead and copper by processing such metals in furnaces adapted for that purpose. Larrick was a frequent visitor to the American scrap yard and was well acquainted with the facilities for loading scrap on to railroad cars for shipment. The knowledge that each of these defendants had of American's business operations would justify the jury in making a finding that their activities knowingly and intentionally aided and assisted Harry Isaacs in making these shipments in interstate commerce. But was it necessary for the Government to establish by direct evidence that when these two defendants participated in this fraud, they knew

that the scrap was to be shipped in interstate commerce? The three defendants, Harry Isaacs, Ossanna and Larrick, were knowingly involved in a scheme and plan to defraud whereby American, through Isaacs obtained underground cable and feeder cable. One of the confederates in the crime, Harry Isaacs, actively took charge of the merchandise thus obtained by shipping the same in interstate commerce as alleged in these counts. The offense thereby as to each of the defendants became complete under Section 2314, Title 18, United States Code. This view is supported in United States v. Tannuzzo, 2d Cir., 174 F.2d 177, 180, cert. den. 338 U.S. 815, rehearing denied, 338 U.S. 896, wherein the court stated,

> "But the evidence against Vespole was sufficient to convict him under the substantive indictment. The statute under which he was indicted and convicted of the substantive offense does not require proof of knowledge on his part that the stolen goods were to be transported in interstate commerce. It only requires that he knew that the goods had been stolen and that he caused them to be thus transported. If, as the evidence indicates, Vespole stole the furs and turned them over to Tannuzzo and Dellaratta to sell for joint account, without limitation as to where the sale was to be made, the jury might properly find that Vespole caused their transportation when one of his confederates arranged for a sale to Felstein pursuant to which they were taken across a state line. Conviction for the substantive offense would follow from our holding in United States v. Sherman, 2 Cir., 171 F. 2d 619, 623, 624, under a similar statute."

The several motions for judgments of acquittal filed by defendants Ossanna, Larrick, Harry Isaacs, Jeffords and

Fred Isaacs as to the count or counts set forth in their notices of motion are denied. It is so ordered.

Exceptions to these rulings as to each defendant are reserved.

The motions for new trial are predicated mainly upon the alleged misconduct of the Assistant United States Attorney, Hyam Segell, in his closing argument to the jury. Some of the objections would seem to emanate from supercritical and overly sensitive counsel who, with microscopic captiousness, find fault with the most innocuous statements of government counsel. Other objections have merit and the Court in his charge made specific references to them and instructed the jury to disregard government counsel's argument in the matters to which reference was made. It may be stated that the Court does not approve of the extent to which Mr. Segell assumed to draw certain conclusions and make certain assertions which the evidence did not justify, and his argument at times exceeded the standards of propriety that government counsel should observe. However, I am convinced that the portions of the argument objected to did not affect nor sway the jury to an unjust verdict.

Some comment may be made with reference to portions of Mr. Segell's argument and as to which objections were made. Mr. Segell stated to the jury:

> "Can you imagine my colleague, Clifford Janes, gentleman that he is, a man who will give up a point in a lawsuit rather than offend his fellow counsel, the gentleman that he is, can you imagine him sitting here—and he is in charge of this lawsuit—can your imagine him sitting here for 16 weeks believing that Earl Jeffords was innocent?"

Well, this statement was prompted by and in response to Mr. Smith's argument to the jury wherein he criticized government counsel because they did not afford his client, defendant Jeffords, a lie detector test, and intimated that the Government believed the testimony Jeffords gave before the Grand Jury or they would have given him a lie detector test. Certainly, in light of Mr. Smith's argument, this response was justified.

The Court in his charge instructed the jury in conformance with a request of the defendant Larrick that there was no evidence that Larrick had received any moneys or profits from any of the transactions which the Government contends were part of the scheme to defraud or conspiracy or that he received any property, money or thing of value in connection therewith. And then in light of the Segell argument to the jury wherein he assumed to argue that inferences could be drawn that out of the fraud these defendants received illgotten gains, the Court again stated to the jury that there was no evidence to support the statement of Mr. Segell that there was any money fraudulently passing back and forth between or among the defendants from the Jeffords commission transaction, or the Isaacs scrap transaction, or the Francis commission payments. Notwithstanding, the defendants contend that a new trial should be granted because Mr. Segell assumed to state to the jury that inferences could be drawn from the testimony that there were pay-offs or kick-backs to these defendants from the fraudulent transactions in which these defendants were engaged. But did the failure of the Government in every instance to trace the fraudulent diversion into the pockets of the conspirators negate the right to argue that there was a strong inference that, where there is fraud, illegal gains for someone is the inevitable, motivating purpose and result? Those who commit fraud do not

carry on such activities for altruistic purposes or objectives. Someone usually benefits from wilful fraud. Otherwise, there would be no purpose in indulging in such activities. Certainly, Harry and Fred Isaacs obtained fraudulent money by reason of their conduct, and Jeffords likewise. And Ossanna clearly received fraudulent benefits through the Hopkins right-of-way deal and Towey through the Harriet lot sale. The inference that someone profited in carrying out the activities which established the overall scheme to defraud was so pronounced that Jeffords' counsel, Donald Smith, in his closing argument, recognized that the manner in which Jeffords handled the commission moneys he received would strongly indicate that there was a pay-off to someone. But he presumed to argue that, in that Jeffords was a gambler and was in the habit of handling cash money in the manner which he did, no such inference, therefore, was justified. Is it conceivable that Jeffords received over $100,000 on phoney commission deals without someone participating in the spoils? Or can reasonable persons believe that the palms of someone were not greased when George Francis was paid $238,000 in commissions? Or that when the Isaacses, with the connivance of Ossanna and Larrick, were permitted to swindle the Transit Company out of thousands of dollars due it for scrap without those who fraudulently worked hand in hand with them being rewarded in some manner for their contribution to the illegal windfall? The jury could not be expected to deliberate on the facts of this case as if in a vacuum immunized from the facts of life.

The Court did state that there was no evidence of pay-offs and kick-backs as related above, and there was no direct evidence in that regard, but that did not mean necessarily that, if the jury found fraud, the jurors should

not use their common sense as rational human beings and draw such inferences as reasonable men would do under the circumstances. Moreover, this was not a close case where some unjustified remarks of the prosecutor may have brought about an unjust result. The fact that the defendant Blumenfeld was acquitted and that the defendants Ossanna, Larrick and Harry Isaacs were acquitted on certain counts would indicate that the attacked summation of the Assistant United States Attorney should not be the basis for a new trial.

The statement of the Court that this was not a close case does not mean that difficult and troublesome questions did not arise, or that the almost four months' trial was free from problems for the Court and the jury. However, that there was fraud in the scrap deals with American, that there was fraud in the payment of commissions to Jeffords, that there was fraud in the payment of the Francis commission, that there was fraud in the Harriet lot sale, and in the Hopkins right-of-way transaction with Carlson, was overwhelmingly clear. Defendants' counsel argue, however, that the very suggestion by the Assistant United States Attorney to the jury that money passed between these defendants as the result of the American scrap transactions and the Jeffords and Francis commission payments, would tend to unduly sway the jury so that they would be influenced to find fraud where no fraud existed. But that argument is not persuasive with reference to the Jeffords commission which was baldly fraudulent on its face, or as to the Francis commission where the notes in question were discounted at from five to eight per cent, together with a brokerage fee of $5,000 to certain New York attorneys, while George Francis received over $238,000 as commission. The Court is convinced that, in light of

the entire record and the Court's charge, government counsel's argument as to kick-backs and pay-offs did not sway the jury to an unjust verdict.

The Court has considered all of the various grounds asserted in support of the motions for judgments of acquittal or a new trial. Many of the matters were fully argued during the trial or at the conclusion of the Government's case, and at the close of all the testimony. Further detailed discussion on my part should not be necessary. In such a long and arduous trial, it would be unusual indeed if the Court did not commit some error. But the Court is convinced that any errors committed would not justify a new trial. The Court bent every effort to give these defendants a fair trial and they received an impartial trial. The entire proceedings were remarkably free from incidents that would tend to incite or prejudice the jury against the defendants.

After careful consideration, I am of the opinion that the showing here does not justify the granting of a new trial to any of the defendants and their respective motions in that regard will be, and are, denied. It is so ordered. Exceptions are reserved.

The moving defendants will appear before this Court on Tuesday, November 15, 1960, at 9:00 o'clock A.M., for sentence. Counsel are advised accordingly.

Dated this 5th day of November, 1960.

BY THE COURT:

GUNNAR H. NORDBYE,

United States District Judge

APPENDIX

Minneapolis Conversion Ordinance of October 30, 1953

OFFICIAL PUBLICATION
of ORDINANCES and RESOLUTION
passed by the City Council of the
City of Minneapolis, Minnesota, at an
Adjourned Session of the Regular Meeting
of October 30, 1953, held October 30, 1953.

(Published November 3, 1953, in Finance and Commerce)

AN ORDINANCE

To provide for the paving, surfacing and restoration of the City Streets on the Minneapolis Street Railway Company right-of-way by the City of Minneapolis and the Minneapolis Street Railway Company, and the payment by the Minneapolis Street Railway Company for said work as a condition to the discontinuance of streetcar service on lines in the City of Minneapolis.

Whereas the Minneapolis Street Railway Company, hereinafter referred to in this ordinance as the "Company", has a franchise with the City of Minneapolis, hereinafter referred to as the "City", for the operation of its street railway on the streets of the City of Minneapolis, consisting of an ordinance passed by the City Council on July 9, 1875, approved July 17, 1875, entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," (City Ordinances, Permanent Edition, 61:1), and an ordinance passed by the City Council on September 19, 1890, approved September 22, 1890, entitled "An Ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis, by elec-

tricity," (City Ordinances, Permanent Edition, 61:19), under the terms of which the Company has obligations to pave, maintain, repair and improve the space between the rails of its tracks in the City of Minneapolis; and

Whereas the portions of the streets between the Company's tracks are at the present time in need of substantial repairs and replacements to comply with the Company's obligation under the foregoing provisions of its franchise, and the Company has other obligations in respect to the City streets under the provisions of said franchise; and

Whereas the Company has applied to the City of Minneapolis for permission under its franchise to discontinue the operation of its streetcars on certain of its lines and tracks, and contemplates in the future applying for discontinuance of operation of its streetcars over its remaining lines and for the substitution of buses therefor over routes to be determined; and

Whereas upon the discontinuance of the operation of the Company's streetcars on the various routes it will be necessary on certain of the City streets to remove the tracks, switches, ties, paving and other equipment in the streets used in the operation of the Company's street railway system and to reconstruct and pave such portions of the street as may be necessary as the result of such removal, and, certain of the other streets, it will be necessary to prepare the surface of the streets by removal of mates, frogs, switches, cross frogs, turn-offs and other special work, and to remove or stabilize loose rails and paving blocks so that the City may surface those streets with paving on top of the rails and right-of-way of the Company; and

Whereas it has been determined that it is practicable for the City to perform a portion of this work, consisting of paving and repaving, where necessary, and surfacing the street over the rails and right-of-way, where repaving is not deemed necessary;

The City Council of the City of Minneapolis do ordain as follows:

Section 1. This ordinance is designed to prescribe the procedure to be followed by the Company as a condition to the discontinuance of the operation of its streetcars in the City of Minneapolis on any of its lines, pursuant to its duty under its franchise; and the consent of the Company and compliance with, the terms of this ordinance shall be made before the City Council shall relieve the Company of its obligations under its franchise and approve of discontinuance of the operation of streetcars on any of the Company's lines.

Section 2. For the work to be done by the City in paving and surfacing the portions of the streets now covered by the Company's tracks and right-of-way, the Company shall pay to the City the sum of Ten Thousand Dollars ($10,000.00) per street mile where there are tracks of the Company in the City streets, to be paid in the manner hereafter provided. The streets for which payment is to be made include all streets in the City of Minneapolis wherein street railway tracks are now located (with the exception of certain dirt streets, as hereinafter provided); including streets upon which streetcars are now being operated and streets upon which streetcar service has already been discontinued. The number of miles of streets for which payment is to be made has been calculated and ascertained by the Engineer for the Company, and it is hereby deter-

mined and agreed that the number of miles of streets requiring paving and resurfacing, and for which the Company shall make payment, as so determined by its Engineer, is 92.279 miles.

Section 3. In addition to the payment provided for in the preceding paragraph, the Company shall perform work and assume obligations as follows:

On the streets where it is determined by the City Engineer that the portion of the street occupied by the Company's right-of-way need not be repaved, the Company shall remove all mates, frogs, cross-frogs and switches, and shall remove such portions of branch-offs or turn-offs as shall be designated by the City Engineer; and, when directed by the City Engineer, the Company shall restore the street following the removal to a solid and secure condition within two inches of the track grade in preparation for paving surfacing by the City. When directed by the City Engineer, it will remove all loose paving blocks or paving materials on the Company's right-of-way, and when materials are removed, if directed by the City Engineer, the Company shall replace them by concrete or other materials to make the surface secure as a base for paving surfacing by the City. The rails and materials removed by the Company under the provisions of this paragraph shall become the property of the Company. The surface of the right-of-way and the rails shall be lowered or raised to within two inches of the grade of the adjoining rails. This includes the raising of low or depressed rail joints. This work shall be done as requested by the City Engineer and at the times and in the manner directed by and under the supervision of the City Engineer. The Company shall perform the work provided for in this paragraph only to the

extent of a cost to the Company of not to exceed $300,000. As the work progresses the Company shall furnish the City with monthly statements, on or before the 20th of each month, showing the amount of work provided for in this paragraph which has been performed during the preceding month. When the work performed by the Company approaches the $300,000. limitation, the Company shall give the City thirty days' notice before it discharges its crews and disposes of its equipment; and if the City so elects by promptly notifying the Company, the Company shall retain its crews and equipment for the continuation of any unfinished work provided for in this paragraph at the expense of the City, with the understanding that the City Engineer specify to the Company the additional work to be performed sufficiently in advance so that the crews retained by the Company shall be employed without interruption or layoff. Any amounts for which the City shall be obligated to the Company on account of this continuance of the work shall be applied against the payments due from the Company and accruing thereafter.

The Company shall remove trolley poles as requested by the City and backfill the holes. In instances where poles have to be cut off, such cutting shall be done below the surface of the ground or sidewalk. Where the poles are located in concrete surfacing, such as sidewalk, the surface where the poles have been removed shall be replaced with concrete. Where poles are removed in seeded or lawn areas, the holes shall be capped with a minimum of one foot of backfill of soil suitable for the growth of grass.

The Company shall start on this work as directed by the City Engineer and shall complete the work by December 31, 1955; provided, however, that in the case of delay

caused by strikes or national shortages of materials, the time for completion shall be extended to the extent of the delay created thereby.

Upon request by the Company, the City, through its City Engineer, shall furnish to the Company information and instructions in respect to the work to be performed by the Company so that there will be no delay in the progress of the Company's work.

Section 4. The obligation of the Company under its franchise to indemnify the City against claims for damages arising out of the construction or management of its tracks and roads shall continue as to any portion of the Company's tracks and right-of-way until the work of the Company on that particular portion is completed and approved by the City Engineer, and until discontinuance of streetcar service thereon is authorized by the City.

Section 5. Where in the judgment of the City Engineer it is necessary to remove ties, such removal shall be made by the City. On such portions of the track and right-of-way that the City Engineer determines that the old paving shall be removed and that portion of the street repaved, the Company shall have no obligation in respect to preparation of the street for the paving.

Section 6. Where the tracks of the Company cross railroads, the Company will remove and restore the crossings at those locations where the Company has the obligation of control of the crossings and is responsible to the railroad company therefor. At other crossings, where the crossings were established by and are the responsibility of the railroad company, the Company shall have no responsibility. On railroad bridges, owned by railroad companies,

the rails and the paving of the Company's right-of-way shall become the property of the City.

The rails on the Bryant Avenue Bridge, across Minnehaha Creek, and on the Bryant Avenue streetcar line, shall be removed by the Company within thirty (30) days after the discontinuance of the street railway operations thereon, and the ends of the bridge barricaded.

Section 7. Unpaved streets occupied by the tracks of the Company are not included in the calculation of miles of the Company's lines covered by this ordinance. The Company agrees to remove the rails and ties from the unpaved streets. The Company may make this removal on unpaved streets at any time after April 1, 1954, upon notifying the City Engineer of its intention so to do; and it shall make such removal within sixty days after notice from the City's Engineer to do so. The Company agrees to backfill the street to established grade with suitable additional material. The obligation of the Company to backfill shall be limited to a cost of $5,000 for labor and material, and if the cost to the Company exceeds that amount, the City Engineer shall be immediately notified, and unless the City Engineer elects otherwise, the Company shall complete the backfill and credit the expense in excess of $5,000 to future payments to be made under the terms of this ordinance. The obligation of the Company under its franchise to indemnify the City against claims for damages arising out of the construction or management of its tracks and roads shall continue as to the portion of the Company's tracks and right-of-way on unpaved streets until the removal of the tracks and ties and backfill are completed and approved by the City Engineer. As the work is completed and approved on any portion of said streets, the

Company's liability under this indemnity provision shall cease.

Section 8. On or before December 1, 1953, the Company shall furnish a quit-claim deed to the City of all the right, title and interest of the Minneapolis & St. Paul Suburban Railroad Company to the private right-of-way known as the Lake Harriet right-of-way, extending from Irving Avenue south and 31st street to 44th street and France avenue south, in the City of Minneapolis, upon which said line is now being operated. This deed shall provide that the Company may retain possession of the right-of-way and shall have the right to continue to operate its streetcars thereon until discontinuance is requested by the Company and authorized by the City. Upon discontinuance, the streetcar rails, the power station, underground ducts, electrical transmission cables in ducts, trolley wire and appurtenances, including poles, transmission line tunnels, and the terminal buildings at the several car stops shall remain the property of the Company; and the Company shall remove all of them, except underground ducts, within ninety (90) days after such discontinuance. If not so removed, this property, except underground ducts, may, at the option of the City, be removed, at the expense of the Company, or, at the City's option, shall become the property of the City.

Section 9. It is contemplated by the City and the Company that the discontinuance of all streetcar operation and the conversion of the streetcar lines to buses shall be completed in the year 1954. If any of the lines are not discontinued in the year 1954, the mileage of those lines shall be deducted from the miles of lines for which it is provided in this ordinance the Company shall make payment, and

the obligation of the Company for payment shall be reduced accordingly. At any time thereafter that the Company applies for discontinuance of such lines, and such discontinuance is approved by the City, the miles of the discontinued lines shall then again be added to the number of miles for which the Company is to make payment and its obligation increased accordingly. The monthly payments, hereinafter provided for, which shall accrue after such decrease or increase in mileage, shall be decreased or increased proportionately so that the total obligation of the Company shall be paid within the ten (10) years hereafter specified.

Section 10. Except as otherwise provided in this ordinance, the rails, paving, ties and materials of the Company in the streets which are not removed by the Company as a part of the work provided for in this ordinance shall become the property of the City. Together with the resolution of the Board of Directors of the Company provided for in Sections 14 and 17 of this ordinance, the Company shall furnish to the City a statement in writing from the Northwestern National Bank of Minneapolis, as trustee, or from its attorney that the requirements of the trust deed in respect to the transfer to the City of the property of the Company, as provided for in this section, and as to the transfer or surrender of other rights or interests in the rails, ties and right-of-way of the Company, as provided for in this ordinance, have been complied with. The Company shall retain title to all underground duct lines and cables in same, tunnels and cables in same, trolley poles, overhead feeder cables and trolley wire and appurtenances, duct line and tunnel manholes, in effect, the electrical transmission system complete.

Section 11. If for thirty (30) days after request by the City Engineer the Company fails to perform any portion of the work provided for in this ordinance, that work shall be done by the City Engineer and the expense thereof shall be charged to the Company, unless by reason of weather conditions and the elements this period of time is unreasonably short, in which event the time may be extended by the City Engineer.

Section 12. The sums of money to be paid by the Company under the terms of this ordinance shall be made in consecutive monthly payments, the first payment to be made December 1, 1953, said monthly payments to continue for a period of eight (8) years until the full sum has been paid. The monthly payments for the first six years shall each be in the sum of $7,690.00, and the monthly payments for the last two years, viz.; commencing December 1, 1959, shall each be in the sum of $15,380.00, except the last monthly payment shall be in the sum of $15,370.00. The obligation to make these monthly payments shall be evidenced by a series of 96 negotiable promissory notes, one maturing each month for a period of eight (8) years commencing December 1, 1953, each of said notes to be respectively in the principal amount above set forth. These promissory notes shall carry no interest until the maturity of each payment. In case of default of any payment the Company shall be obligated to pay to the City six per cent (6%) interest on the defaulted payment from the time of the default. In case default in one or more payments continues for more than three (3) months, the City may declare the entire unpaid balance immediately due and payable. Each note shall be duly executed in behalf of the Company by its duly authorized officers. Neither Twin City Rapid Transit Co. nor Minneapolis Street

Railway Company shall pay any dividends on the stock of either company if and as long as the companies are in default in the payment of any of the monthly payments imposed upon them by the provisions of this Section 12 hereinabove set forth, the same being represented by the Promissory notes due monthly all as hereinbefore set forth.

Section 13. The Company shall furnish and deposit with the City Treasurer negotiable government bonds or securities of equal value in the sum of $120,000, the deposit to be made upon the condition that if the Company is in default in the payment of the sums of money, or in the performance of the work, or the carrying out of the other obligations of the Company under this ordinance, the City may sell said bonds or securities and apply the proceeds against the obligations of the Company to the City. Such sale and application shall not be considered as removing the default unless and until the Company restores the securities to the full amount. So long as the Company is not in default in the performance of any of its obligations under this ordinance, it shall have the right, and the City shall give it the opportunity, to clip the coupons and receive the interest on the bonds or other securities on deposit with the City.

In addition to the deposit of bonds or securities, the Company agrees that the Twin City Rapid Transit Company shall guarantee the payment of the sums of money and the carrying out of the other obligations of the Company under this ordinance, and shall make this guaranty by filing with the City Clerk of the City its written acceptance of the ordinance and the conditions thereof, accompanied by a certified copy of a resolution of the Board of Directors of the Company authorizing such acceptance and such guaranty.

The company shall continue to furnish the City monthly financial statements, as has been its practice.

Section 14. This ordinance shall become binding upon the Company upon the Company's filing with the City Clerk of the City of Minneapolis its written acceptance of the ordinance and the conditions thereof, accompanied by a certified copy of a resolution of the Board of Directors of the Company, authorizing such acceptance, and the furnishing of the security provided for in the preceding section.

Section 15. Upon acceptance of this ordinance by the Company and the payment in full to the City of the sum of $922,790 as provided herein, the Company shall be released from all of its obligations under the franchise ordinances of 1875 and 1890 as to paving and maintaining of streets, snow and ice removal, street cleaning and flushing, and sanding, and its obligation to indemnify the City, and from all other obligations imposed by existing ordinance or resolution, on all of the streets and streetcar lines where street railway operation has been discontinued by authority of the City Council. So long as the Company is not in default in any of its monthly payments under this ordinance, its obligations under previously existing ordinances and resolutions as enumerated in the preceding sentence shall be suspended, except as otherwise provided specifically in this ordinance, as to each streetcar line as the service on such line is discontinued with the consent of the City; and as the Company completes the work to be performed by it under Section 3 of this ordinance, on any portion of its discontinued lines, to the satisfaction of the City Engineer, it shall be fully released from its obligations under said previously existing ordinances and resolutions

in respect to those portions of its street railway where said work has been completed.

Section 16. The City Council of the City of Minneapolis shall not hereafter authorize the discontinuance of any of the Company's street railway lines, or any portion thereof, except following acceptance by the Company of the terms of this ordinance nor so long as the Company shall be in default in carrying out any of the provisions of this ordinance; and the City Council of the City of Minneapolis shall not hereafter approve of the operation of buses on any streetcar routes until authority for the discontinuance of operation of streetcars on those routes has been granted, except by amendment with specific reference to this section of this ordinance.

Section 17. The Company shall procure such approval, if any, as is required by law, of this ordinance, and the Company's obligations to make payments thereunder. The Company, through its Board of Directors, shall adopt a resolution as prescribed in Article VI, Section 6.2 of the Mortgage and Deed of Trust from the Company to the Northwestern National Bank of Minneapolis, as Trustee, dated October 1, 1944, and shall furnish copies of said resolution to the Trustee and to the City; and the Company shall procure such other agreement or consent to the provisions of this ordinance from other mortgagees, lien holders or creditors as may be required by any agreement between them and the Company.

Section 18. The approval and authority for the operation of motor bus service by the Company and the discontinuance of streetcar service upon the following lines: Minneapolis portion of Minneapolis-St. Paul line, Fort Snelling-Minnehaha line, Plymouth-East 25th Street line,

Bryant-Johnson line, Selby-Lake line and Chicago-Penn-Fremont line, as provided for in ordinances passed by the City Council relative thereto on October 30, 1953, are given upon compliance with the terms and conditions of the ordinance of October [3]0, 1953, entitled "An Ordinance to provide for the paving, surfacing and restoration of the City streets on the Minneapolis Street Railway Company right-of-way by the City of Minneapolis and the Minneapolis Street Railway Company, and the payment by the Minneapolis Street Railway Company for said work as a condition to the discontinuance of streetcar service on lines in the City of Minneapolis," as hereby amended, and compliance with said ordinance as originally passed shall not be required.

Passed October 30, 1953, W. Glen Wallace, President of the Council

Approved October 30, 1953, Eric G. Hoyer, Mayor

Attest: Imogene M. Clay, Assistant City Clerk.

As amended November 27, 1953.

APPENDIX

Removal Contract between the Transit Company and American Iron

A. Contract of February 11, 1952 *

THIS AGREEMENT, made and entered into this 11th day of February, 1952, by and between American Iron & Supply Co., a corporation, of Minneapolis, Minnesota, hereinafter referred to as "Contractor," and The Transit Supply Company, a corporation, of Minneapolis, Minnesota, acting as agent for Minneapolis Street Railway Company, The St. Paul City Railway Company, and Minneapolis & St. Paul Suburban Railway Company, hereinafter called "Railway,"

WITNESSETH:

That it is mutually agreed by and between the parties:

1. Contractor shall remove railway tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the lines hereinafter designated, and shall restore the paving and public property to conform to adjacent conditions where such tracks, wires, poles, ties and other appurtenances are removed.

This contract is entire, and performance of each and every item thereof is required as to track, overhead wires, ties, poles and appurtenances upon and along the following streets or locations:

a. West Broadway from Penn Avenue North to Xerxes Avenue North

* Each of the nine lines or portions of lines specified in this contract were located in Minneapolis except the Mahtomedi line ("G" Par. "1") which had in fact been removed shortly before February 11, 1952 (Vol. 27, pp. 66-7; Vol. 69, pp. 35-6).

b. Morgan Avenue North from West Broadway

c. 19th Avenue North from Morgan Avenue North to Upton Avenue North

d. 35th Street from Cedar Avenue to 23rd Avenue South

e. 23rd Avenue South from 35th Street to 38th Street

f. 38th Street from 23rd Avenue South to 28th Avenue South

g. Suburban line extending from Hyacinth wye in the City of St. Paul through North St. Paul, Wilernie and terminating at the Village of Mahtomedi wye.

h. 28th Avenue South from 38th Street to Minnehaha Parkway

i. East Hennepin Avenue from Johnson Street to Stinson Boulevard

2. Contractor will perform each and all operations in a careful and workmanlike manner satisfactory to Railway. To assist in avoiding breakage and damage regarding removal and handling of all special work, frogs, mates, switch boxes and controls, Contractor always will follow instructions of representatives of Railway until all such special work as specified from time to time is removed and disposed of in accordance herewith.

3. The Contractor will resurface and restore all portions of roadways and streets from which said Railway equipment is removed to conform with adjacent and surrounding surfaces in durability, finish and quality, and as required by all City Ordinances and satisfactory to the City Engineer, other public authorities, and Railway engineer in which the operations are performed.

4. Before Contractor may start any operations, Railway will provide a descriptive sketch for each of the locations, which by reference immediately shall become an integral part of this contract, the same as though now included verbatim herein.

5. As full compensation to be paid to the Contractor by the Railway under this contract, the Contractor shall receive from the Railway all of the materials which it removes as herein specified, except such as Railway desires to keep in accordance with the descriptive sketches and specifications, and clear and full title to all such removed materials as Railway does not designate that it wishes to keep shall pass to Contractor immediately upon removal and at the location thereof, the same as though formal bills of sale were executed and delivered to Contractor for all such removed materials. In the event the Railway exercises its right to keep any of said materials, it agrees to pay the Contractor the market value of such scrap materials retained or reimburse it with a like amount of other suitable scrap. The Contractor shall comply with National Production Authority order M-64.

6. Railway reserves the option to retain such rail as it may select. The Contractor shall, nevertheless, remove the same and shall be reimbursed by a like amount of scrap rail or other suitable scrap.

7. Railway reserves the option to remove and retain any special work, frogs, mates, switches and crossovers, and if this option is exercised, the Railway engineer shall designate such items at the time when removal operations at any location are about to be commenced. If Railway exercises this option relating to the foregoing described items, it will resurface and restore such portion of the

roadways and streets from which said items have been removed and the Contractor shall be relieved from doing so.

8. Contractor has made and will perform this contract expressly as an independent contractor and assumes all authority, control, direction, liability and supervision over equipment, means, methods and men employed, and each and every share of operations undertaken from time to time hereunder. Railway reserves merely and only the right to determine whether or not breakage and damage to any of its property may be prevented and whether or not the final results are satisfactory to Railway and to interested governmental, municipal and public authorities.

9. Contractor also accepts and assumes entire liability, whether actual or threatened, that may or does result under all ordinances, laws and statutes, and by whomsoever advanced or asserted, and indemnifies, will defend and will hold Railway harmless forever against any and all Workmen's Compensation liability and all other claims, demands, expenses and suits for all damages and injuries, and will reimburse Railway pursuant to all commission orders, and court decisions, and for all costs, expenses, judgments, liabilities and losses of all kinds by reason of all thereof. Throughout the entire operations and until completion thereof, Contractor shall maintain such safety barriers, wood blocks and barricades as are necessary for the safety of the public, and do everything in a manner calculated to avoid accidents, injuries and damages insofar as is reasonably possible.

Contractor further agrees to comply with all applicable, established and publicly promulgated and published ordinances, laws, regulations and statutes, and will save Railway harmless from any charge of violation thereof and any

penalty thereunder on account of any of Contractor's operations pursuant hereto.

10. This contract contains the entire agreement and contract covering all such operations, and it may not be changed or modified in any manner except by mutual assent thereto in writing, signed respectively by qualified officers or other duly authorized representatives of Contractor and of Railway.

11. As further consideration for the above undertakings on the part of the Contractor the Railway agrees that it will give the Contractor first option to purchase all of its other scrap materials at the then established ceiling price. Whenever any of such scrap is available for sale, the Contractor shall be notified and it shall indicate its desire to purchase said scrap material at the then established ceiling price within a period of ten (10) days.

12. In all instances Contractor will await specific authorization and consent from Railway as to the time when any and all operations hereunder may be started, continued and completed, and Contractor will comply therewith.

13. It is contemplated that all operations under this contract shall be completed prior to December 31, 1952. If Contractor has fully performed all obligations and undertakings in a manner acceptable to the Railway and interested public authorities, this contract shall be considered as completed, except for the indemnity against claims provisions hereof. This contract, however, may be extended by mutual consent of the parties for an additional period of one or more years to cover such projects as Railway may designate during such extension.

IN WITNESS WHEREOF Contractor and Railway, by their respective duly authorized officers, have caused this agreement to be duly executed the day and year first above written.

AMERICAN IRON & SUPPLY CO.
By *H. A. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

Mary H. Larsen

David E. Ellison

THE TRANSIT SUPPLY COMPANY
By *Fred A. Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

B. First Addendum to Contract of February 11, 1952 **

It is agreed between the undersigned that the following streets or locations shall be included under Paragraph 1. of said contract dated February 11, 1952:

Randolph Line - Open track from Hyacinth Wye to East 7th Street and Van Dyke Avenue. East 7th Street from Van Dyke Avenue to Mississippi Street. Randolph Avenue from West 7th Street to Cleveland Avenue. Cleveland Avenue from Randolph Street to Ford Road. Ford Road from Cleveland Avenue to Ford Loop.

Ft. Snelling - Maria Line - Ft. Snelling Bridge not included. West 7th Street from Ft. Snelling Bridge to 4th Street West. Maria Avenue from East 7th Street to Hudson Road. Hudson Road from Maria Avenue

** Each of the seven lines or portions of lines specified in this addendum were located in St. Paul; the City of St. Paul did not then require repaving where tracks were removed in paved streets. (Vol. 50, pp. 223; Vol. 69, p. 37).

to Earl Street. Earl Street from Hudson Road to Burns Street. Burns Street from Earl Street to English Street.

Rice Street - South St. Paul Line - Rice Street from Ivy Avenue to Como Avenue. Robert Street from 4th Street East to Concord Street. Concord Street from Robert Street to Annapolis Street (City Limits). Concord Street from Annapolis Street to Linden Street (South St. Paul).

St. Clair - Phalen Line - St. Clair Avenue from Cleveland Avenue to West 7th Street. Lafayette Road from East 7th Street to Collins Avenue. Collins Avenue from Lafayette Road to Burr Street. Burr Street from Collins Avenue to Minnehaha Avenue. Minnehaha Avenue from Burr Street to Payne Avenue. Payne Avenue from Minnehaha Avenue to York Avenue. York Avenue from Payne Avenue to Greenbrier Street. Greenbrier Street from York Avenue to Maryland Avenue. Maryland Avenue from Greenbrier Street to Forest Street. Forest Street from Maryland Avenue to Phalen Park Phalen Park Right of way.

Grand - Mississippi Line - Grand Avenue from Cretin Avenue to Oakland Avenue. Oakland Avenue from Grand Avenue to Ramsey Street. Ramsey Street from Oakland Avenue to West 7th Street. Mississippi Street from East 7th Street to York Avenue. York Avenue from Mississippi Street to Westminister Street. Westminister Street from York Avenue to Case Avenue. Case Avenue rom Westminister Street to Arkwright Street. Arkwright Street from Case Avenue to Brainerd Avenue. Brainerd Avenue from Arkwright Street to Ivy Avenue. Ivy Avenue from Brainerd Avenue to Payne Avenue. Payne Avenue from Ivy Avenue to Nebraska Avenue.

Hamline - Cherokee Heights Line - Prior Avenue from University Avenue to Minnehaha Avenue. Minnehaha Avenue from Prior Avenue to Hamline Avenue. Hamline Avenue from Minnehaha Avenue to Thomas Avenue. Thomas Avenue from Hamline Avenue to Como Avenue. Wabasha Street from 4th Street to Winifred Street. Winifred Street from Wabasha Street to Ohio Street. Ohio Street from Winifred Street to George Street. George Street from Ohio Street to Smith Avenue. Smith Avenue from George Street to Annapolis Street.

Snelling Crosstown Line - Snelling Avenue from Highland Parkway to Selby Avenue. Pascal Avenue from Como Avenue to Arlington Street. Arlington Street from Pascal Avenue to Hamline Avenue. Hamline Avenue from Arlington Street to Hoyt Avenue.

It is understood that insofar as the above added seven (7) lines are concerned, the Contractor shall not be bound to repave any of said streets, provided, however, that after the removal of said track, he shall leave all of said streets in a condition usable for traffic. If any unusual situation arises in the work on any of said foregoing streets, the same shall be subject to negotiation between the Contractor and the Railway.

AMERICAN IRON & SUPPLY CO.
By *H. A. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

M. H. Larsen

L. L. Balich

THE TRANSIT SUPPLY COMPANY
By *Fred A. Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

C. The Second Addendum to Contract of February 11, 1952

It is agreed that American Iron & Supply Company shall complete the removal of railways tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the lines of Minneapolis Street Railway Company, The St. Paul City Railway Company and Minneapolis and St. Paul Suburban Railway Company, as set forth in contract dated February 11, 1952 and first addendum signed August 13, 1952.

It is further agreed that American Iron & Supply Company shall remove railway tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the remaining lines of Minneapolis Street Railway Company, The St. Paul City Railway Company and Minneapolis and St. Paul Suburban Railway Company, as directed by the Railway, until complete conversion and removal of all of the above is effected. On the lines which are not paved, American Iron & Supply Company shall leave all such streets in a condition usable for traffic.

All of the above streets or locations shall be included under paragraph 1. of said contract dated February 11, 1952.

In addition to the lines of said Railway, as described above, covered by the original agreement of February 11, 1952, first addendum signed August 13, 1952 and this addendum, removal of machinery, structures, and miscellaneous items and appurtenances on property of Railway at Nicollet and 31st Street, No. 1 Garage on Currie Avenue, Washington and 24-26 Avenues North garage, all in Minneapolis, and property known as Snelling Yards, in

St. Paul, together with removal of underground cables and hauling of any of the above, shall be included under paragraph 1. of said contract dated February 11, 1952.

All of the provisions of the original contract of February 11, 1952 shall apply to this addendum.

Dated this 2nd day of January, 1953.

AMERICAN IRON & SUPPLY CO.
By *H. H. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

B. W. Lund

Vicki Fay

THE TRANSIT SUPPLY COMPANY
By *Fred A: Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

APPENDIX

Judgments of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,656, September Term, 1961

HARRY H. ISAACS,

Appellant.

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Harry H. Isaacs, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,655, September Term, 1961.

FRED ISAACS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Fred Isaacs, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,662, September Term, 1961.

FRED A. OSSANNA,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ——— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ——— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Fred A. Ossanna, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,663, September Term, 1961.

BENSON M. LARRICK,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Benson M. Larrick, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,669. September Term, 1961.

EARL A. JEFFORDS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Earl A. Jeffords, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX

Order of the Court Below Denying Petitions for Rehearing

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1961.

No. 16,655

Fred Isaacs, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,656

Harry H. Isaacs, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,662

Fred A. Ossanna, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,663

Benson M. Larrick, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,669

Earl A. Jeffords, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

Petitions of appellants for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

April 20, 1962.

APPENDIX

Order of Associate Justice Byron R. White Extending Time for Filing of Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1961

FRED ISAACS, ET AL.,

Petitioners,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 19, 1962.

Dated this 1st day of May, 1962.

BYRON R. WHITE,
Associate Justice of the Supreme Court of the United States.

APPENDIX

Portions of the District Court's instructions relating to the Minneapolis Conversion Ordinance of October 30, 1953.

"It is the Government's contention that, to all intent and purposes, the contract of February 11, 1952, and the addenda thereto, were abandoned, and in pursuance of the scheme to defraud, American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and to repave where necessary; that in order to be relieved of the obligations of rail removal and repaving which American had assumed under the February 11, 1952, contract and its addenda, together with being relieved of snow removal and sanding of streets, and so forth, and other provisions of the franchise, the ordinance provided that Transit was required to pay to the City of Minneapolis some $900,000, plus a sum not to exceed $300,000 to reimburse the city for the special work which it was required to perform.

"It is the Government's position, therefore, that American never did sustain any losses in the handling of Transit's overhead scrap, and that any projected losses, if it had performed its contract, is, according to the Government, merely hypothetical, in that by the passage of the ordinance, it was the scheme and plan of one or more of the defendants to place American in a position whereby it would be relieved of the burden of its contract to remove tracks and repave where necessary, * * *." (V. 69, pp. 39-40)

"The contracts, members of the jury, as written constituted valid covenants binding upon the parties.

"Well, what about their performance? Did American proceed in good faith to carry out its agreements with respect to the removal of rails and repaving? American contends it lost heavily on removal [of] rail, primarily because of concrete adhering thereto, the expense of removal, the preparing the rails for scrap, repaving, together with the then low price of scrap steel, and that these conditions brought about a substantial loss to it and that if it had been required to go forward according to the terms of its contract, it would have lost some $900,000.

"The Government contends on the other hand, that American sold all the rail, overhead wire, feeder cable, and a substantial number of the poles as scrap, and did not lose any money in removing and disposing of this material. The Government contends that the parties never intended in good faith to go forward *with the contracts* according to their terms regarding the demolition of the system, but that the handling of the scrap with no supervision or control by Transit employees, and with the relieving of American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance, and granting to American the underground cable at prices far below its market value, establish, according to the Government, that there had been conceived in the minds of one or more of these defendants, the plan to loot and plunder the Transit Company of its assets as charged in the indictment." (V. 69, pp. 88-9)

"What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which

the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit BZ? Or did American in good faith indicate its willingness to go forward with its obligations under this contract?" (V. 69, pp. 137-8).

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 187

FRED ISAACS AND HARRY ISAACS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 188

BENSON M. LARRICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 189

EARL A. JEFFORDS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 194

FRED A. OSSANNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. J. App. 1–65) is reported at 301 F. 2d 706. The opinion of

the district court (Pet. J. App. 67–86), overruling motions for judgments of acquittal or in the alternative for a new trial, is not reported.[1]

JURISDICTION

The judgments of the court of appeals were entered on March 22, 1962 (Pet. J. App. 111-115). Petitions for rehearing were denied on April 20, 1962 (Pet. J. App. 117–118). On May 1, 1962, Mr. Justice White extended the time for filing petitions for writs of certiorari to and including June 19, 1962 (Pet. J. App. 119). The petitions in Nos. 187, 188 and 189 were listed on June 18, 1962. The petition of Ossanna (No. 194) was filed on June 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's findings that petitioners were engaged in one overall scheme to defraud a corporation by looting its assets.

2. Whether the instructions misled the jury upon the basic issues in the case.

STATEMENT

Petitioners were charged in the District of Minnesota with various offenses resulting from a scheme to defraud. A 17-count indictment, returned September 18, 1959, charged petitioners Ossanna, Larrick,

[1] The record on file with the clerk of the court consists of the trial transcript, the original papers and proceedings in the district court, and the proceedings in the court of appeals, including a transcript of the oral argument. The trial transcript contains 72 volumes, separately paginated, and is herein designated "R.", preceded by the volume number.

Harry Isaacs and two others with mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), interstate transportation of stolen goods (18 U.S.C. 2314), and conspiracy to commit these offenses (18 U.S.C. 371). Petitioner Jeffords was charged in the same indictment under the conspiracy count only. A second single-count indictment, charging the identical conspiracy, was returned on January 20, 1960, against the petitioner Fred Isaacs, and another.

All the petitioners were found guilty of participating in the conspiracy. Petitioners Ossanna and Larrick were also convicted on eleven of the twelve substantitive counts submitted to the jury and Harry Isaacs was convicted on nine additional counts. The prison sentences imposed against all petitioners can be supported by the verdict on conspiracy count.[2]

1. THE SCHEME CHARGED

The indictment charged a scheme to defraud the Twin City Rapid Transit Company and its subsidiaries, the corporate complex operating the transit system in the Minneapolis-St. Paul area. The overall scheme, and each of the transactions alleged, involved the disposition of property which had become surplus as a result

[2] Ossanna and Harry Isaacs were each sentenced to four years' imprisonment and fined $11,000—a $1,000 fine on the mail and wire fraud counts and a fine of $10,000 on the interstate transportation and conspiracy counts (72 R. 33–34, 45–46). Larrick was sentenced to two years' imprisonment and fined $3,000—a $1,000 fine on the mail and wire fraud counts and $2,000 on the interstate transportation and conspiracy counts (72 R. 52–53). Jeffords was sentenced to imprisonment for eighteen months and fined $1,500 (72 R. 54–55) and Fred Isaacs was sentenced to imprisonment for one year and a day and fined $2,500, on the conspiracy convictions (72 R. 56).

of the conversion of the transit system from streetcars to buses. The indictment particularized the following fraudulent transactions, as parts of the scheme: (1) transfer of track, overhead structures and underground cable, now surplus, to the American Iron and Steel Company for grossly inadequate considerations; (2) payment of unearned commissions to petitioner Jeffords upon the sale of three parcels of surplus real estate; (3) allowance of excessive discounts and payment of false commissions in connection with the sale of eight guaranteed promissory notes of a Mexican company received by Transit in payment for surplus streetcars; (4) sale of real property known as the "Hopkins Right-of-way", supporting a now abandoned streetcar line, at an inadequate price; and (5) sale of surplus lots for less than one-fourth their value to the defendant[3] Towey. It was also charged that the American Iron and Steel Company, having become obligated to the Transit Company to resurface some Minneapolis streets, "would be relieved of such obligations without consideration and at the expense of the Transit Companies."

2. THE EVIDENCE

The evidence is set forth in detail in the opinions of the court of appeals (Pet. J. App. 4–5, 12–34) and of the district court (Pet. J. App. 69–77). Fraud in the transfer of scrap to American Iron and Steel Company, in the payment of commissions, and in the sale of real estate, is not disputed. The facts may be briefly summarized as follows:

[3] Towey was not tried because of illness.

In 1951, petitioner Ossanna became president of the transit company after a stockholders' committee, which included defendant Towey and petitioner Jeffords, successfully ousted the prior management in a proxy fight (2 R. 37, 88–89, 117; 40 R. 87, 123). Defendant Towey became a company officer with the advent of the Ossanna administration (3 R. 6). A decision to convert the transit operation from streetcar to buses (6 R. 36–37, 52–54) made surplus the property used in streetcar operations, including streetcars, the tracks upon which they ran, the cables, wires, and other property needed to supply the cars with power, the power plant furnishing the power, the rights-of-way used by the cars, the barns used for storage and other real property connected with the streetcar operations.

In March 1952, petitioner Larrick was employed to conduct the conversion program and was placed in charge of the scrap resulting from the conversion (4 R. 125, 135–137; 6 R. 123). In February 1954, he became a director of the transit company (57 R. 49).

a. Beginning in mid-1951 and extending to August 1955, the transit company disposed of trolley wire, streetcar tracks, underground cable and various miscellaneous items used in streetcar operations as scrap metal to the American Iron and Steel Corporation, a company controlled and managed by petitioner Harry Isaacs and petitioner Fred Isaacs, his son. Inadequate consideration was paid for the "scrap", especially the underground cable. For these transactions, the transit company, under the direction of

Ossanna and Larrick, abandoned accounting procedures and permitted no supervision or control over scrap disposition (8 R. 60; 5 R. 104; 7 R. 184–185; 26 R. 10, 13–17, 26–27).

Initially the scrap was transferred under a letter agreement consummated in August 1961, entered into by Ossanna and Harry Isaacs for their respective companies, under which American agreed to remove all rail and overhead wire of abandoned streetcar lines without cost to the transit company, repaving the streets when necessary, in exchange for all the material removed (6 R. 79). American repaved only one street under the agreement, receiving extra compensation for that work (9 R. 38–39; 40 R. 39–40). In February 1952, the companies entered into a formal contract covering eight streetcar lines. Again American was required to repave in exchange for the material removed (6 R. 94–102; Pet. J. App. 101–106). But American removed no additional steel rails from streets which would have required paving (50 R. 115–116). In August 1952, in an addendum to the contract (Pet. J. App. 106–108), seven more lines were added, American assuming no repaving obligation. On January 2, 1953, a second addendum to the contract (Pet. J. App. 109–110) purportedly gave American the right to retain all underground cable after removal, though Ossanna had already been informed that the copper and lead in the cables was worth $1,000,000 and could be removed at a cost of approximately $50,000 (6 R. 36–40). Larrick had been apprised of a valuation placed upon this cable (17 R. 85–86, 106–107, 125–127).

In July 1953, Harry Isaacs represented to the transit company that the removal contract was unprofitable and asked to be released (9 R. 55). In August 1953, at the urging of Ossanna, the Board of Directors of the transit company authorized Ossanna to make adjustments with American (9 R. 52-54). In October 1953, the transit company entered into an agreement with the City of Minneapolis under which the company was to pay the city $922,790 for repaving the streets over its rails and agreed to expend an additional $300,000 for special work required to remove items such as streetcar switches from the streets (51 R. 132–134; 21 R. 56–75; Pet. J. App. 87–100).

After the major portion of the streetcar lines had been abandoned, it became possible to remove the underground cable. In 1954, over 6,000,000 pounds of the 8,000,000 pounds of cable in the system was taken from the ground (Ex. JT). Cable worth $938,000 was sold to American for only $122,500. This result was accomplished by resorting to false weighing and underpricing (Exhibit KR; 25 R. 88–89, 99–100). Transit crews removed the cable from the ground and it was hauled by American trucks to its yards (12 R. 4, 87–88; 14 R. 44–45). There it was given false weights under the immediate direction of Fred Isaacs (16 R. 30, 38–39, 44–45, 56–57, 124–125; 22 R. 21–22). Larrick, who visited American offices frequently, required that all tickets showing weights be forwarded to him (8 R. 78–79; 22 R. 133–135). Ossanna and Larrick allowed American to price the metal received (4 R. 124–125, 135–137; 22 R. 131–144; 26 R. 90–91),

representing to the transit company's board of directors that the company was being paid the market values for its scrap (40 R. 191–192).[1]

b. In 1954 and 1955, the transit company paid petitioner Jeffords, a real estate broker, $107,500 in "commissions" in connection with the sale of three parcels of real estate, for which he performed no services. In July 1954, when the company sold its street car power plant, he was paid $12,500 on a requisition signed by Larrick and Ossanna, initialed by defendant Towey. Ossanna had negotiated the sale and Larrick had participated in some of the discussions (37 R. 26–28, 52–55, 64–66, 69). In November 1954, Jeffords was given $20,000 on a requisition signed by Ossanna, based upon an unsupported claim that he had an exclusive sales contract (36 R. 80–85; 37 R. 82, 135). In January and February 1955, he was paid $35,000 and $40,000 on authorization of Ossanna, Larrick and Towey in connection with the sale of the property. The evidence disclosed that a false exclusive listing contract and false corporate minutes were used to justify and disguise this payment (38 R. 100–116). Of the $107,500 received by Jeffords, a total of $81,500 was withdrawn in cash on the various dates of deposit (39 R. 83–90, 100–102).

c. In May 1955, the company, acting through Ossanna and Towey, sold an abandoned streetcar right-of-way

[1] To support the conviction under the interstate transportation counts (14, 15, and 16), evidence was introduced that part of this scrap had been shipped in interstate commerce (23 R. 137, 140–141, 143; 24 R. 55–58).

(the Hopkins line) to co-conspirator Walter N. Carlson for $10,000 (35 R. 42–43, 79). This property had been appraised and valued at from $84,500 to $150,000 (34 R. 40–41, 117, 134–135, 160–161). Carlson, following negotiations in which Ossanna was active, sold the major portion of this tract for a total of approximately $126,000. Carlson paid over $52,000 of this amount to Ossanna's children, who in turn endorsed $30,000 to Ossanna and to an Ossanna-owned company (36 R. 31–32, 50, 53–54, 62–66). Petitioner Jeffords, who had acquired from Carlson an option to buy a small portion of this right-of-way, netted $14,000 on this transaction. After agreeing to pay $6,000 for the option, he was paid $8,000 for releasing a fraction of the optioned property and sold the balance for $12,000 (35 R. 49–53, 61, 63).

d. In 1953, the transit company had received promissory notes as partial payment for the sale of 91 surplus streetcars (28 R. 16, 29–38). These notes had been guaranteed by an agency of the Mexican government, and were financially sound (27 R. 77). In April and July 1955, the transit company, acting under authority of a board of directors which included Ossanna, Larrick, and Towey, sold four of the notes to one bank for $351,079.25, and the remaining four to another bank for $323,585.59 (29 R. 21–41, 149–150). Out of the proceeds of these two sales, George Francis was given amounts totalling $238,349.73 in April and August of

[5] The court instructed the jury that there was no evidence that Larrick or Harry Isaacs participated in this transaction (69 R. 60, 102–104).

1955 (29 R. 30–45; 30 R. 109–110).[6] In August 1955, $83,316.31, the amount of a transit check payable eight days earlier to Francis, was deposited in a bank account in the name of George A. Francis. About a week later $53,000 in cash was withdrawn from this account (29 R. 44–45, 30 R. 36–39, 45).

5. In 1953 or 1954, Larrick offered to sell cheaply certain lots in the Harriet streetcar right-of-way. Towey accepted his offer and bought a lot for $500, using the name of his uncle (33 R. 145–147, 85–88, 92). Approximately six months later, Towey sold the lot for $5,500 (33 R. 176–180). Ossanna, seconded by Larrick, offered a motion before the transit company's board of directors which approved the sale to Towey's uncle (44 R. 148).[7]

3. THE INSTRUCTIONS

The court charged the jury repeatedly that, if it did not find an overall scheme to defraud, it must acquit petitioners. For example, it charged (69 R. 104–105):

> I have emphasized throughout this charge that the Government relies on an overall scheme

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[6] Before the sales (at 92 and 87% of the face value), the transit directors, at the urging of Ossanna, adopted a resolution authorizing the sale of these notes at a 40% discount to George Francis (29 R. 141–147).

[7] Harry Isaacs was acquitted on the substantive counts arising out of the transaction.

[8] There was evidence that Harry Isaacs was a partner in the Mid-Continent Development and Construction Company which also acquired certain real estate and scrap from the transit company (31 R. 19–23, 40–50). See the court's instructions (69 R. 43–44).

to defraud, and unless that has been established as to the mail and wire fraud counts and the conspiracy count, the Government's case as to such counts must fail. In other words, even though some of the defendants were guilty of fraud or wrongdoing, and even though you may find certain combinations of defendants engaged in separate or distinct schemes to defraud the Transit Company, that is not the crime charged in the indictment as to these counts and would not support a verdict of guilty as to any of these defendants as to such counts.

For instance, there is no evidence that Harry Isaacs, or Larrick, or Blumenfield participated in the Hopkins right-of-way transaction, or the Villaume commission matter. There is no evidence that Jeffords participated in any transaction except his commission deals and some dealing in the Hopkins right-of-way. There is no evidence that Ossanna participated in the Towey transaction.

In order to find these men guilty of the mail and wire fraud counts, and the conspiracy count, you must find from the evidence, members of the jury, that there was initiated by one or more of these defendants an overall scheme to defraud the Transit Company during the conversion, and that the other defendants, or a defendant, with full knowledge of the scope and objects of the scheme, knowingly and wilfully became a part thereof and performed some affirmative act in furtherance thereof.

Therefore, although a defendant may not have known what may have been done by another defendant, if they are all intentional parties

> to a common overall scheme to defraud the Transit Company in the manner alleged in the indictment, with knowledge of its objects and purposes, then the act or acts of their fellow wrongdoers become his or their act or acts, if such acts are done in the furtherance of the scheme to defraud alleged during its existence.

The court repeated in its charge (69 R.111):

> If the evidence does not establish that there was beyond a reasonable doubt the overall scheme to defraud as alleged in the first count, then it would be your duty to return a verdict of not guilty as to all defendants on the mail fraud and wire fraud charge and the conspiracy count. * * *"

See also 69 R. 85–86, 106–108, 110–111, 119, 123, 130–131, 141–142, 151.

ARGUMENT

1. That petitioners' conduct was fraudulent and that each of them conspired with some of the others is not disputed. The claim is that, although the judge repeatedly told the jury that it could not convict the defendants unless it found that they were part of a single overall conspiracy and scheme to defraud, and although the court of appeals, in painstaking and exhaustive review of the evidence, concluded that the evidence supported the jury's verdict, nevertheless this Court should hold that the evidence did not establish a single scheme. There is no occasion to review the evidence in this regard.

The jury was justified in inferring—indeed the evidence compelled the conclusion—that there was one

overall scheme to defraud the transit company of the assets made surplus by the conversion from streetcars to buses. This conspiracy had as its central core the transit officials, "insiders" Ossanna, Larrick and Towey. But the "insiders" could not achieve their objectives alone. The broad and maturing conspiracy also required the aid of many "outsiders." Strangers to the company, involved in legitimate enterprises, were necessary partners to give the internal looting the outward appearance of arm's-length business dealings. It was their role to give a "guise of legitimacy" to the transactions of the "insiders".

Initially, since a scrap dealer was needed, Harry Isaacs and his son Fred joined the scheme. False weights and rigged prices permitted a fraud in underground cable alone of $815,000. As the overhead structures, rails and cable were removed, the streetcar rights-of-way from which this material was removed became saleable. Real estate agents became essential parties in disposing of these assets. With Jeffords, the means employed was a false claim for $107,500 in real estate commissions. With Carlson, the device used was an outright sale of realty, approximately $75,000 below its market value. In the disposal of the streetcars, instead of directly falsifying the sale, false commissions, amounting to $238,439, were invoked when the promissory notes received in payment were discounted. Finally, Towey was able to perpetuate a relatively minor fraud by pretending that a third party was buying a parcel of real estate. Common to all these transactions, and underlying them, was a

common scheme to use an inside position within the transit company to dispose of its assets improperly.

With respect to the "insiders", the complaint of prejudicial misjoinder has no semblance of a reasonable foundation. The whole scheme to mulct the company, from beginning to end, depended upon their informed and interested cooperation. The only basis for their complaint is that each of them was not shown to have directly participated in a particular (and minor) facet of the overall scheme.[9] But, this in no way affects the correctness of the jury's verdict. The fact remains that every one of the frauds was made possible only because the "insiders" used their control of the company to loot its assets. To this single general scheme, the "insiders" were so clearly central parties that no further discussion is warranted.

Nor is the situation really different with respect to the "outsiders"—Harry and Fred Isaacs, who benefited so substantially in the scrap deals, and Jeffords, who received more than $100,000 in commissions he did not earn. The jury's conclusion that they, also, were part of an overall scheme is fully justified.

It is true there was no showing that either Isaacs was involved in the real estate sales (aside from the investment of Harry Issacs in Mid-Continent) or that Jeffords was involved in the scrap sales. Each, to

[9] As already noted (supra, p. 11), the judge told the jury that Larrick was not shown to have been directly involved in the Hopkins transaction and that Ossanna was not shown to have participated in the Towey real estate purchase. This ruling was more favorable to Ossanna than the evidence required since, as appears from the Statement, he did, in fact, participate to some extent in the Towey transactions.

that extent, may have been interested only in his cut of the pie. But all three of them well knew that there would be no pie to cut without corrupt "insiders" in control of the company.

Indeed, the Isaacs almost admitted as much. In 1959, when Internal Revenue agents interviewed Fred and Harry Isaacs, Fred brought up the problematical case "[o]f a company like ours that stole from the Transit Company a lot but reported the profits," and inquired, "why is the Internal Revenue in on it? It's something for the stockholders." Harry Isaacs added, "We are not the only ones that got something for this company. How about that guy in St. Paul? How about Northern States Power?" (24 R. 132–133). And while there was no similar proof as to Jeffords, it is a reasonable inference that, as one of the stockholders' committee who put the directors in office, he knew what the "insider" directors must do to arrange his unjustified commissions.

The "outsiders" were necessarily aware that their share in the fraud depended on the larger plan of the "insiders" to loot the company's property. Their knowing and interested cooperation made them a part of the overall scheme. Like the salesmen in *Blumenthal* v. *United States*, 332 U.S. 539, each of the "outsiders" here, though actively interested only in his own (very substantial) share of the spoils, knew that his success depended on the fraudulent control of the company. It does not matter that they did not participate in every facet of the overall conspiracy, share

in all its details, or know the role or the identity of every co-conspirator. *Id.*, at 556–559.[10]

2. As noted in the Statement, American (the Isaacs company) assumed the obligation of resurfacing certain Minneapolis streets torn up by the removal of rails. But, by a later agreement between the city and the transit company, in the form of an ordinance, the city undertook to do the necessary repaving, at a cost of $922,790 to the transit company, which also agreed to expend $300,000 in special removal work. (Pet. J. App. 87–100). Thus American was never called upon to repave the streets. It was the government's theory that, by effectively shifting the financial burden of resurfacing from American to Transit, this agreement made it possible for American to obtain scrap at less than normal cost.[11] The government expressly dis-

[10] The general sentence imposed on Ossanna, Larrick and Harry Isaacs on the conspiracy count also rests on a conviction for the substantive offenses of interstate transportation of fraudulently obtained property (counts 14, 15, and 16). The court of appeals found it unnecessary to consider the validity of these sentences under the rule of *Lawn* v. *United States*, 355 U.S. 339, 359.

[11] Government counsel said in part (68 R. 65–66): "The Government doesn't claim that the conversion ordinance was a part of a scheme, but the Government does point out to you, though, the fact that after the conversion ordinance was passed nobody seemed to pay any attention, any further attention to this contract which was still in force and effect, and the Twin City Rapid Transit Company had to promptly go out and remove three hundred thousand dollars worth of rail or special work in the City of Minneapolis, and did they bill American Iron for that? That was American Iron's obligation to remove that under that contract, if the defense is correct. Did they do that? That's where the conversion ordinance comes into this picture, to see and examine for yourselves whether that

avowed any claim of fraudulent conduct between the city and the company in the enactment of the ordinance (68 R. 24, 65–66). The court correctly stated the government's contention that "American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and repave where necessary * * *" (69 R. 39–40; see also 69 R. 88–89; Pet. J. App. 120–121). Later, the court said (69 R. 137–138, Pet. J. App. 121–122):

> What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit BZ? Or did American in good faith indicate its willingness to go forward with its obligations under this contract?

In these circumstances, petitioners' claim that the instruction misled the jury into believing that they could base their verdict on a finding of fraud in the procurement of the municipal ordinance is plainly without merit. Even standing alone, the reference to the ordinance is not open to this interpretation.

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contract meant anything, not whether the conversion ordinance was a part of the scheme, but whether the contract had any significance and what attention these defendants paid to that contract after the conversion ordinance was passed."

Certainly, in context, it could not be misconstrued. As the court of appeals said, "when considered in light of the issue that was litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or submit an issue that was not supported by evidence." (Pet. J. App. 50).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1962

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v.

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v.

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EARL A. JEFFORDS, *Petitioner*

v.

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FRED A. OSSANNA, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONER OSSANNA TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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FRED A. OSSANNA, *Petitioner*, v. UNITED STATES OF AMERICA	No. 194

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY OF PETITIONER OSSANNA TO BRIEF FOR THE UNITED STATES IN OPPOSITION

INTRODUCTION

Any summation of the facts of the enormous record below by petitioner and the respondent would naturally have certain differences. That is true in this case. But the differences are so minor to the fundamental issues presented by this that no effort need be made in this brief reply to contradict the government's statement of the facts. Indeed, the Government's statement of the facts, slanted as it naturally is in the Government's behalf, substantiates the existence of those very issues which petitioner Ossanna originally believed were worthy of review by this Court upon a writ of certiorari.

THE KOTTEAKOS DOCTRINE IS PLAINLY APPLICABLE

Petitioner has never contended that the instructions of the trial judge viewed as an abstract proposition with respect to the ruling of this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), were incorrect. But it is hornbook law that it is prejudicial error for a judge to give instructions permitting a finding of guilt unwarranted by the evidence of record. *Bollenbach* v. *United States*, 326 U. S. 607 (1946). And this is what has occurred in this case, for the finding of the jury can rest only on the existence of an over-all conspiracy in which all of the defendant-petitioners took part.

There is simply no evidence to substantiate such a conclusion. The Government's statement of the facts in its Brief in Opposition fails of proof to that effect. Admittedly the evidence of record could support findings of a series of conspiracies in which the insiders—Ossanna, Larrick and Towey—could have been participants. This series of conspiracies is set forth on page 4 of the Government's brief, to wit, (1) the disposal of scrap to American Iron, (2) the payment of "unearned" real estate commissions to Jeffords,

(3) the commissions paid for discounting the Mexican notes, (4) the sale of the "Hopkins Right-of-Way", (5) the sale of surplus lots to Towey, as to which the trial judge declared that Ossanna had no connection. The only connecting link that can be made between these several conspiracies so as to treat them as a single over-all conspiracy, is that they all related to the sale of property made surplus by the Transit Company's determination to convert from street-car to bus operations—surplus property that was of various kinds—scrap, securities and parcels of real estate.

Exactly this same link existed in *Kotteakos* v. *United States, supra*. The only difference is that in *Kotteakos* the insider consisted of one man and not three—an utterly immaterial difference. Brown in *Kotteakos* in substance held himself out as one who could arrange loans on a fictitious basis with the Federal Housing Administration. Had he had a brother or a partner in that enterprise, the conspiracies proved still would have been several and not single. Had one of borrowers learned from another borrower that Brown was available for such an illegal operation, the conspiracies still would have been several and not single. As this Court in *Kotteakos, supra* at p. 755, approvingly quoted the statement of the Court of Appeals, 151 F. 2d at 173: "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a 'fence' to make them such."

Yet this is the theory of the Government. It admits that the Isaacs were not involved in the real estate sales and that Jeffords was not involved in the sale of scrap. But it argues that "each, to that extent, may have been interested only in his cut of the pie. But all three of them well knew that there would be no pie to cut without corrupt 'insiders' in control of the company." (Gov't Brief, pp. 14-15). In short, each

of the various outsiders may have known that the insiders were a "fence", although no proof of this fact exists, but that knowledge, as this Court has said, is not enough to make them confederates.

The Government tries to apply the principles enunciated in *Blumenthal* v. *United States*, 332 U. S. 539 (1947) to buttress its position, saying (Gov't Brief, p. 15) that "the 'outsiders' were necessarily aware that their share in the fraud depended on the larger plan of the 'insiders' to loot the company's property" and that consequently "their knowing and interested cooperation made them a part of the overall scheme." There is nothing in the record to support this assertion. The success of the alleged fraudulent scheme to acquire the scrap had no dependence on the sale of the Mexican notes or on the sale of the parcels of real estate. All were separate and independent transactions. *Blumenthal* v. *United States*, *supra*, upon which the Government relies, is a wholly different situation. There the evidence specifically established that the "salesmen were aware that their individual sales were part of a larger common enterprise, dependent on the carefully involved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor. . . . Each salesman knew . . . that the elaborate arrangements were made not merely for his sales but also for others. . . ." *Ibid* pp. 555-56, notes 14, 16. Obviously no such similar inference can be derived from the evidence of record in this case. The most favorable inference that can be made is that the outsiders knew that the insiders were operating something in the nature of a "fence", like Brown in *Kotteakos*, but, as this Court has stated, that knowledge, if it existed, is not enough to make them confederates.

In short, *Blumenthal* is not the governing case; *Kotteakos*, which the Government studiously ignores, is.

THE LIABILITY OF THE INSIDERS

Petitioner as distinguished from petitioners Isaacs or Jeffords is admittedly an "insider". As to them, the Government says: "The only basis for their complaint is that each of them was not shown to have directly participated in a particular (and minor) facet of the overall scheme." (Govt's Brief, p. 14) This is not a correct statement of the position of petitioner-Ossanna. His claim has always been that he has been prejudiced, equally with the outsiders, by being charged with an over-all conspiracy as to which there was no proof. Whether or not he and the other insiders could in the Court's opinion be found guilty of a different conspiracy or series of conspiracies is not material. As this Court said in *Kotteakos* v. *United States*, *supra* at pp. 763-764:

> "Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler* v. *United States*, *supra* at 611; *Bollenbach* v. *United States*, 326 US 607, 612, 613. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error."

The application of the principle of the *Kotteakos* case to petitioner Ossanna is clear and simple as was pointed out in his original petition, pp. 12-13. It is this: the vice of a variance between the indictment for a single over-all conspiracy and the proof of several unrelated conspiracies, even though they may have a central hub, rests not in the

fact that certain of the convicted defendants may be innocent of the over-all charge, but that there has been prejudice throughout the trial to all the defendants, including the "insiders". That prejudice affects petitioner Ossanna to the same degree as it affects the so-called "outsider" petitioners.

THE EQUIVOCAL INSTRUCTIONS TO THE JURY

The Government's Brief emphasizes the equivocal character of the trial court's instructions to the jury with respect to the ordinance of the City of Minneapolis relieving the Transit Company for a consideration of its duty to repave streets from which the rails had been removed, thus shifting the cost of repaving from American Iron and Steel Corporation to the Transit Company.

The issue of fraud in connection with this ordinance was submitted to the jury under instructions permitting them to find (a) that the procurement and adoption of the ordinance was a device arranged by Ossanna and Isaacs to free American Iron from the alleged onerous burden of repaving, or (b) that the ordinance was an evidentiary factor that Ossanna and Isaacs at the time of the original contracts entered into a scheme to make the surplus scrap available to American Iron at bargain prices, never intending to carry out the original contracts. The court below found that there was no evidence to support theory (a), nevertheless, mistakenly in petitioner's opinion, concluded that giving the instruction did not constitute prejudicial error.

The Government, however, now (Brief p. 16) contends that the facts justified the instruction as set forth in (a) above despite the holding of the court below to the contrary, namely, that there was no evidence to support fraud in the procurement or adoption of the ordinance. (App. 49) With

the ambiguity of the instructions of the trial court, with a complete variance between the Government and the court below as to what theory the facts of record could support, it is impossible to say that the jury was not confused as to the critical part that the ordinance played in its conclusion that petitioners were guilty. Under such circumstances prejudicial error must be deemed to have been committed. *Bollenbach v. United States, supra.*

CONCLUSION

For the reasons herein stated, it is submitted that this case is deserving of review by this Court and that the petition for certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 187

FRED ISAACS AND HARRY ISAACS

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

The Government's Brief in Opposition merely serves to demonstrate the importance of the questions presented and the conflict between the rulings below and the decisions of this Court.

1. The Government makes no effort to defend the theory on which the court below affirmed the convictions of the Isaacs (Pet., pp. 17-19). Instead, it argues that, to give a "guise of legitimacy" to their transactions, the "insiders" required the aid of many "outsiders" engaged in "legiti-

mate enterprises" (Br., p. 13).[1], and that the Isaacs and other "outsiders", in turn, became both "knowing" and "interested" participants in the "larger plan" of the "insiders", because each "knew that his success depended on the fraudulent control of the corporation". (Br., p. 15).

The short answer is that, if the success of the scrap transactions depended on the fraudulent exercise of such control in the disposition of scrap, this gave the Isaacs no reason to know of, or interest in aiding, fraud in the transfers of *other* surplus property or the employment of *other* "outsiders" to give such transfers the guise of legitimacy. Petitioner Harry Isaacs acquired the Midcontinent properties without fraud, the trial court held as a matter of law (Pet., pp. 7-8), and understood that others had made similar purchases, as appears from the statement of his quoted by the Government (Br., p. 15).[2] In fact, it is not even claimed that there was fraud in the transfer of surplus property, other than scrap, between mid-1951, when the scrap transactions commenced, and March, 1954, when Towey purchased certain real estate in another's name.

The vice of the Government's argument is not in its appraisal of the evidence, but in the basic legal criteria advanced for determining guilt on a charge of an over-all conspiracy. On the Government's theory, the "wide-sweeping

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[1] In this reply brief, the petition of Fred Isaacs and Harry Isaacs in No. 187 is cited as "Pet.", the joint appendix to this petition and those in Nos. 188, 189, and 194, as "Pet. Jt. App.", and the Brief for the United States in Opposition as "Br.".

[2] In the mentioned statement (Br., p. 15), Harry Isaacs referred to the Northern States Power Company, which acquired the Transit Company's power plant (V. 37, pp. 29-32, 53-4), and a resident of St. Paul, who purchased certain real estate from the Transit Company (V. 31, pp. 7-8). Neither was named as a defendant or co-conspirator in the Indictments or bill of particulars or accused of any fraud at the trial. Assuming that the "problematical" or "hypothetical" question asked by Fred Isaacs on the same occasion (V. 24, pp. 132, 58) was an admission of fraud in the dealings between American Iron and the Transit Company, it does not refer to transactions between the Transit Company and any other "outsider".

nets of conspiracy prosecutions" would extend to new fields previously excluded from its reach, contrary to the warning in *Grunewald v. United States*, 353 U. S. 391, 404 (1957). On its theory, evidence of illegality in the transactions between an "insider" and any "outsider" normally engaged in a "legitimate" enterprise would always support a finding of "knowing and interested" participation by such "outsider" in a "larger plan", involving other illegal transactions of the "insider" with other "outsiders" also engaged in "legitimate" enterprises. On this basis, conspiracy prosecutions could always be used to transfer evidence of guilt *from one defendant to another in one proceeding* whenever a corporate or public officer or other fiduciary were charged with using "inside" influence for private gain in granting a number of contracts or licenses to several "outsiders" engaged in "legitimate" enterprises, a result heretofore deemed forbidden by this Court's decision in *Kotteakos v. United States*, 328 U. S. 750 (1946). Cf. *Canella v. United States*, 157 F. 2d 470 (C. A. 9, 1946).

The Government's theory, indeed, would in principle permit this to be done in every case to which *Kotteakos* has heretofore been held to apply. For the success of the scrap transactions (and that of all others tried below) depended not merely on "inside" control by the Transit Company's officers. It depended at least as much on concealment of the alleged abuse of their fiduciary obligations. "Secrecy and concealment are essential features of a successful conspiracy" in all cases. *Blumenthal v. United States*, 332 U. S. 539 (1947). But active participation by one conspirator in concealment for one purpose does not of itself afford a basis for a finding that he had knowledge of additional objectives of other conspirators in such concealment, as this Court held in *Ingram v. United States*, 360 U. S. 672 (1959), or a purpose to further any such additional objec-

tives. In *Kotteakos* itself, the Government conceded that an interest in concealing the common figure's practice of processing fraudulent applications by ostensible home owners for Federal home improvement loans, though shared by each of the applicants, was insufficient to establish the requisite common purpose of a single, over-all conspiracy.[3]

Nothing in *Blumenthal v. United States, supra*, on which the Government relies, supports its theory. There, "each" of the "salesmen" whose conviction was affirmed "knew" that "elaborate arrangements" were "made not merely for his sales, *but also for others*" (332 U. S. at 555, n. 16; italics supplied), to give all the illegal sales the "guise of legitimacy" (*id.* at 553-5, n. 14), and, as salesmen, each "intended to aid the owner" in selling a "larger" quantity.[4] *Id.* at 559. As shown, the "guise of legitimacy" the-

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[3] In that case, the Government conceded that the evidence showed several conspiracies, rather than one, even assuming that each knew the common figure, Brown, was processing fraudulent applications for others (Brief for the United States in *Kotteakos v. United States*, Nos. 457, 458, October Term, 1945, p. 21), and stated: "So long as Brown was able to carry on without detection, each group was interested only in its immediate venture" (id., p. 22). This Court, similarly, approved the statement of the Court of Appeals in that case that "Thieves who dispose of their loot to a single receiver—a single 'fence'—do not by that fact alone become confederates". *Kotteakos v. United States, supra*, at 755.

[4] In *Blumenthal*, two carloads of whiskey were distributed and sold by an unidentified owner at over ceiling prices, under an arrangement whereby title to both carloads was ostensibly taken in the name of an established wholesale dealer, and the whiskey was then sold in small lots to ultimate purchasers through several salesmen. The salesmen each knew that the whiskey he sold was part of "carload" lots and commenced soliciting customers almost "simultaneously". Each salesman made arrangements with the purchasers to furnish the purchasers with invoices, at the same below-ceiling prices, to comply with the record-keeping requirements of local law, and each salesman received a check from the purchaser for the invoiced amount and an additional secret sum in cash, for remittance to the owner. There was thus evidence that each salesman knew the quantity of whiskey he sold was only part of "carload" lots, followed a "singularly set pattern" in making his respective sales, and personally participated in carrying out the "elaborate arrangements" designed to conceal the violation of price ceilings in all the sales, and thus knew that "*other salesmen* paralleling his efforts *were making sales similar to his*", as "part of a larger common enter-

ory, as sought to be applied here, would extend to all allegedly illegal dealings between an "insider" or any "common figure" and "outsiders" regularly engaged in "legitimate enterprises," and thus would substantially limit, and indeed wholly undermine, the principle enunciated in *Kotteakos*.

2. The Government, for the third time, has changed its position on the basic issue whether the adoption or procurement of the Minneapolis Conversion Ordinance was a part of the alleged scheme to defraud, and now relies on a theory which, as the court below concluded and the Government nowhere controverts, was not supported by any evidence.

At the trial, the Government advanced two theories on this issue. The first was that the enactment of the ordinance was itself fraudulent. The Government stated at the trial, as it now does (Br. pp. 16-17), that the ordinance was not fraudulent as between the Transit Company and the City of Minneapolis. But, as the Government now fails to mention, it originally claimed, in particulars given in advance of trial and in the course of the trial itself that, as between the company and American Iron, the "enactment of this ordinance" and its acceptance by the Transit Company was "fraudulent" and "unlawful," in that the company, by thus obtaining at its own expense a release from the company's franchise obligations to repave, thereby procured the release of American Iron from its contract obligations to do so, without any consideration (see Pet., pp. 11-12).

The second theory which the Government advanced at the trial, but which it nowhere mentions now, was that

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prise dependent on the carefully evolved arrangements to give the sales the guise of legitimacy". *Blumenthal v. United States, supra*, at 553-5, n. 14 (Italics supplied).

American Iron had been relieved of such obligation *before* the enactment of the ordinance on October 30, 1953, because allegedly there never had been any good faith intention to enforce the removal contracts between the Transit Company and American from the inception of the letter agreement of 1951 and the first formal removal contract of February, 1952 (see Pet., p. 12). In this view, the financial burden assumed by the Transit Company under the conversion ordinance in 1953 was a result of a prior fraud in not intending to enforce the removal contracts from their inception (see Pet. Jt. App., p. 49).

In final rebuttal argument, however, after the close of the trial, the Government abandoned the first theory, conceding that the "conversion ordinance wasn't a part of any scheme" to defraud (see Pet., p. 13, n. 4), and relied solely on the second theory, that the formal "(removal) contract didn't mean anything" when it was first executed "on February 11, '52" (V. 68, pp. 23-4, 65-6). The trial court nevertheless submitted both theories to the jury (Pet., p. 14).

In the Court of Appeals, the Government reasserted both theories. In particular, as the Government omits to mention, it withdrew the concession made in final argument in the trial court, that the ordinance wasn't a part of any scheme to defraud. While admitting that it had "conceded there was no fraud" in the ordinance in its "closing argument", in the trial court, the Government then claimed that in fact "there *was* fraud in the *procurement* of that ordinance", and that "*We* were in error in the (trial) court below, not the court", thus conceding that fraud in the procurement of the ordinance was in fact submitted to the jury (Transcript of Oral Arguments of Counsel, p. 128, ital. supplied; see Pet., p. 13, n. 4).

The court below, however, concluded that "there was no evidence of fraudulent conduct" in either the "adoption" or "procurement" of the "conversion ordinance", a conclusion which the Government nowhere controverts or even mentions, but held that this issue had never been tried, and affirmed the conviction on the sole ground that there was evidence to support the second of the Government's two theories. The court below said:

> "But fraud in the actual procurement or adoption of the ordinance was never an issue—no one contended that it was—and indeed the Government expressly disavowed any fraudulent conduct between the Company and the city. The Government's theory was, and this became a major issue, that *Ossanna entered into an arrangement with the Isaacses whereby they would ostensibly discharge the obligations of the Company* to the city under the franchise agreement then in effect, *well knowing such arrangement would never be carried out;* that Isaacs' company, American Iron, would never be called upon or required to discharge its obligations under the contract, *and that the Company* would *later* of *necessity* be forced to further obligate itself to the city to secure removal of its property from the streets, to repave and otherwise improve the streets formerly occupied by Company property in order that the conversion program could actually be put into operation. It was in this factual setting that the Government contended that the adoption of the conversion ordinance was in fact a part of the scheme and device to defraud." (Pet. Jt. App., p. 49; italics supplied).

The court below also concluded that this theory was the only one submitted to the jury by the trial court's instructions, when read in the light of the issue litigated, as clearly appears from the very portion of its opinion quoted by the Government (see Pet. Jt. App., p. 50).

Now the Government reverts to the first of its original two theories, that of fraud in the enactment of the ordinance itself, without even mentioning that the court below had rejected it and had affirmed the conviction on the second theory.

The Government states:

> "As noted in the Statement, American (the Isaacs company) assumed the obligation of resurfacing certain Minneapolis streets torn up by the removal of rails. But, by a *later agreement* between the city and the transit company, *in the form of an ordinance*, the city undertook to do the necessary repaving, at a cost of $922,790 to the transit company, which also agreed to expend $300,000 in special removal work. (Pet. J. App., 87-100). Thus American was never called upon to repave the streets. *It was the government's theory that, by effectively shifting the financial burden of resurfacing from American to Transit, this agreement made it possible for American to obtain scrap at less than normal cost.*" (Br., p. 16; italics supplied.)[5]

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[5] The Government's present statement of its position is a reasonably accurate summary of the first of its two theories advanced in the trial court, as appears from the portions of the record set forth in the Petition (pp. 11-13). In the portion of the record which the Government cites to support its summary, however (Br., pp. 16-17, n. 11), the Government, in its closing argument to the jury, abandoned that theory and relied solely on its second theory. There, Government counsel, while conceding that the conversion ordinance wasn't part of any scheme to defraud, pointed to the fact that the conversion ordinance did not entirely relieve the Transit Company of its franchise obligations to remove and repave in paved streets, but left the Transit Company the obligation to do so as to so-called "special work" up to a cost of $300,000.00 (Pet. Jt. App., pp. 87, 90-1). Government counsel argued that, if the "(removal) contract meant anything", the Transit Company should have required American Iron to perform such work but failed to do so. This, he argued, along with failure to require American Iron to repave before the enactment of the conversion ordinance (V. 68, pp. 23-4), confirmed that the removal contracts had never meant anything at all. As no issue is raised as to the sufficiency of the evidence to sustain a finding of fraud on this theory, it suffices to say that in defense petitioners claimed below that the Transit Company's repaving obligations reserved by the ordinance were not delegable, in that the ordinance

This was indeed the first of the two theories submitted by the trial court to the jury, as the portions of the charge emphasized by the Government itself plainly show. The trial court, as the Government correctly points out, attributed to the Government the argument that American Iron was "relieved of its obligation" to repave "by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953", and expressly invited the jury to determine whether "the ordinance" itself was "a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit B-Z?" (Br., p. 17; see also Pet., pp. 14-15). If, contrary to the Government's concession in the Court of Appeals this instruction did not in terms submit an issue as to fraud in the "procurement" of the ordinance, as the Government now asserts (Br., p. 17), it certainly submitted an issue of fraud in its "adoption". Yet, as the court below concluded and the Government here does not controvert, there was no evidence to support a finding of fraud either in the "procurement" or "adoption" of the ordinance.

Where, as here, several "different and conflicting" positions are advanced by the Government in a criminal case with respect to instructions to the jury on a basic issue, it cannot be assumed that the jury was "properly guided". *Bollenbach v. United States*, 326 U. S. 607, 613 (1946). To permit the convictions to stand would be to ignore the vital

required the Transit Company to retain its own forces for the city's use in any "continuation" by the city of the remaining work (Pet. Jt. App., pp. 90-1), that, before the ordinance, the requisite directives by public officials to perform such work were normally deferred, in accordance with long established practice, so as to coincide with a public highway paving program (V. 20, p. 29), and that in the only two instances in which such directives were given before the ordinance, American Iron either did the work or was not required to do so, because the street involved was not listed in the removal contract then in effect (Pet. Jt. App., pp. 102-3).

importance of clear instructions and supporting evidence on such issues, and to invite appellate courts to search for some ground of affirmance of a conviction once obtained, however untenable, in plain disregard of this Court's specific admonition in *Bollenbach* (see Pet., p. 23).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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